FIRE INSURANCE

An Introduction to its Principles and Practice

BY

JOHN DAVIDSON

ROYAL INSURANCE COMPANY LIMITED, EDINBURGH
LECTURER IN THE HERIOT-WATT COLLEGE
EDINBURGH, ON FIRE INSURANCE
PRINCIPLES AND PRACTICE

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FOREWORD.

It may give a better understanding of the purpose this book is intended to serve if I explain that it owes its origin to a course of lectures which I delivered during four winter sessions in the Heriot-Watt College, Edinburgh, to the students, for the Chartered Insurance Institute Examination on Fire Insurance Principles and Practice. It occurred to me that I might expand the notes which I had prepared for these lectures into a form suitable for publication, and in that way make them available for others besides those whom I had the privilege of tutoring. From this it will be gathered that the book is written for the student. All that I have attempted to do is to sketch in broad outline the principles which govern the transaction of fire insurance, and to trace in a more or less general way the lines followed in practice; and I have endeavoured to do this in such a way as to make the book helpful to the student.

I have to express my acknowledgment of the assistance which I myself have received in this

from the various textbooks which already exist. Standard works are these, and their authors are household names in insurance circles. I have to express also my indebtedness to those personal friends of my own who afforded me their help in various ways, in not the least by their friendly criticisms and suggestions.

J. D.

EDINBURGH,
November 1923.

FIRE INSURANCE.

CHAPTER I.

INTRODUCTORY.

FIRE Insurance is a contract, by the terms of which one party—the insurer—undertakes, in return for a stated consideration, to indemnify within prescribed limits another party—the insured—having a definite interest in the subject matter specified in the contract, for the loss which the latter will sustain through the happening of a specified event. "It is a contract belonging to a very ordinary class, by which the insurer undertakes, in consideration of the payment of an estimated equivalent beforehand, to make up to the assured any loss he may sustain by the occurrence of an uncertain contingency."—(Lord Justice-Clerk Moncreiff: *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.* (1883).)

As the terms employed in this definition are important and significant, inasmuch as they ex-

press the peculiar nature of the transaction, and define the functions of a contract of fire insurance, it might be well to examine them briefly.

1. CONTRACT.—It is an agreement, the terms of which are set out in the instrument, otherwise the *Policy*.[1] It is binding on both parties, on each of whom it imposes certain duties and obligations. The duties which the insurer undertakes to perform are of the utmost importance, and failure to carry these into effect when the occasion arises for it to do so would be regarded as a breach of contract and actionable at law. But the insured also has certain duties to perform, and failure to fulfil these will affect his right to the benefits accruing to him from the contract.[2]

2. STATED CONSIDERATION.—In consideration of the indemnity which the insurer undertakes to provide, the insured agrees to pay a stated sum of money, known as the *Premium*.[3] The amount of the premium to be paid is arranged beforehand by the insurer, estimated according to the fire hazard of the risk,[4] and is paid at the commencement of the contract. No change can be made on the amount of the premium during the term the contract runs, unless under circumstances which are stated in the conditions attaching to the policy. The contract is terminable at the expiration of the term stated in the policy, but it may be renewed for a further period by payment of the premium required for renewal, and in the

[1] See infra, page 225.
[2] See infra, chaps. ii. and v.
[3] See infra, page 238.
[4] See infra, page 285.

case of *annual* policies [1] provision is made for automatic renewal. The renewal premium for annual contracts must be paid within fifteen days after the renewal date.[2] The company may increase the premium at renewal if it finds it necessary to do so, or reduce it if circumstances warrant a reduction. When the renewal premium—either at the original charge, or altered—has been paid within the specified fifteen days, the contract continues in force, subject to the same terms and conditions as originally attaching, unless amended or modified by endorsation on the policy.[3]

3. To Indemnify.—A contract of fire insurance is one of indemnity only [4]—*i.e.*, it merely undertakes to make good to the insured the *actual* loss he has sustained,—that and nothing more. All that the insured is entitled to be paid, and all that he can expect, is a sum of money equivalent to the material loss he has suffered as a direct result of the fire. "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it,

[1] See infra, page 232.
[2] See infra, page 234.
[3] See infra, page 233.
[4] See infra, chap. ii.

that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give the assured more than a full indemnity, that proposition must certainly be wrong."—(Lord Justice Brett: *Castellain* v. *Preston* (1883).) It is this principle of indemnity that makes fire insurance possible, for if the companies paid more than a mere indemnity, "and offered a premium for fires, they would cease to be a public benefit and become a public nuisance." [1]

4. WITHIN PRESCRIBED LIMITS.—The company's liability is limited in the contract. This limitation is effected in two ways: (*a*) by the principle of indemnity, and (*b*) by a stated maximum—*i.e.*, the *sum insured*, which fixes the maximum amount the company can be called upon to pay in the event of a loss. The mere fact that a certain amount is stated in the policy as being the "sum insured" does not give the insured the right to payment of that amount if his loss is less than that amount.[2]

5. HAVING A DEFINITE INTEREST.—It is an implied condition of a contract of fire insurance that the insured has an insurable interest in the property.[3] The contract presumes the existence of such interest, and would be invalid without it, for a contract of insurance unsupported by an insurable interest is illegal.[4] The mere possession of a fire insurance policy does not *ipso facto* endow the holder with a legal title to the proceeds of the

[1] Bunyon's 'Law of Fire Insurance.'

[2] See infra, page 13.

[3] See infra, page 16.

[4] See infra, page 17.

policy. Proof of interest is essential, for if the insured is unable to prove his legal interest in the property which forms the subject matter of the insurance, how can he prove his loss? For he can have lost nothing if he had no interest in what has been destroyed, and if he has lost nothing by the fire, he can have no claim under the policy. His right of recovery under the policy will depend upon whether the fire has deprived him of a benefit he derived from the property—*i.e.*, whether he has suffered a loss by the fire, which can only be the case if his interest in the property is of such a nature as to be prejudiced by the fire.[1]

6. THE LOSS SUSTAINED.—Before the insured can recover under a policy of fire insurance, he must prove he has suffered the loss contemplated by the contract. The purpose of the contract is to relieve the insured of the direct loss he will sustain by a fire damaging or destroying the property *specified in the policy*.[2] The contract has no concern with any other fire than what involves the "property insured," or with any other loss than that arising from the damage or destruction of such property. The company is liable only for the value directly destroyed by the fire, for that is the measure of the insured's loss. This eliminates all remote or contingent losses from the scope of the policy. Moreover, the loss must be the result of fire according to the ordinary acceptation of the term "fire"; the fire must be an actual outbreak of fire brought about accidentally;

[1] See infra, page 17. [2] See infra, page 39.

the fire must be the efficient proximate cause of the loss ; and it must be a kind of fire not expressly excluded from the contract.[1]

The loss which a fire brings about is *fortuitous*, for a fire, where it has not been deliberately caused,[2] is an unavoidable or inevitable accident—what in Scotland is known as a *damnum fatale.*[3] Losses arising from the ordinary operations of trade are to be expected. They belong to a natural order of things, and can be foreseen and provided for, if not averted; but the loss which a fire causes is in a different category. It is essentially adventitious and uncertain ; it cannot be foreseen, and it cannot be prevented, for no matter what precautions are taken to guard against an outbreak of fire, these can never produce a sense of absolute security. They may reduce the risk of a fire breaking out, or diminish its consequences, but they can never wholly eliminate the danger ; and just as no one can tell when a fire may occur, or what loss may ensue when it does occur, so no one can positively assert that he is immune from the risk of suffering a loss by fire. It is this characteristic of it—that it is fortuitous and unpreventable, and is a loss to which any member of the community is exposed —that justifies any attempt to mitigate its con-

[1] See infra, chap. iii.

[2] A fire deliberately caused for purposes of fraud—what is called arson or fire-raising—is a criminal act.

[3] An occurrence which is purely the result of adventitious chance is in Scotland referred to as a *damnum fatale*, and, unless it is provided otherwise by special contract or agreement, no liability rests upon any one for any loss or damage caused by such an occurrence.

sequences. Moreover, a loss by fire is not necessarily confined to the individual most intimately concerned, for unquestionably does a fire result in economic loss; and although the worst consequences of a fire will naturally fall upon the person whose property the fire has destroyed, and who will doubtless be the greatest sufferer by it, others besides him will feel its effect in one way or another. This will become apparent if it is considered what would happen were a serious fire to break out in some important manufacturing concern forming the staple industry of a district, and giving employment to a considerable proportion of its population. The economic effects of such a fire on the whole community would be very much similar to what would happen if the factory were to close down; for if, as a result of the fire, work had to be suspended—and that is not unusual where the fire is a serious one,—unemployment for the time being would become general in the district, and through the loss of wages this would entail, the fire would have an adverse effect on the general prosperity of the district, and produce economic loss. This may be an exaggerated case, but it serves to illustrate the community of interest there is in the loss and waste—both economic and material—brought about by a fire, and demonstrates also the need for some provision, such as fire insurance can offer, whereby the effects of a fire are mitigated, not only to the individual, but to the community also. Fire insurance cannot, of course, restore the wealth the fire has destroyed,

for that is impossible, nor does it create new wealth; but in giving a money equivalent to the wealth that has been destroyed, it supplies fresh capital which will enable the manufacturer to resume operations, and in doing this it saves him from possible financial embarrassment and ruin, at the same time alleviating the situation for the community as a whole. In a later chapter it is pointed out that although fire insurance is non-productive itself, it materially assists production, for by the security it is able to provide against loss of capital by fire, it enables capital to be employed in productive purposes with greater freedom and to a greater extent than would be possible were it continually exposed to the risk of loss and destruction by fire. Protected by a policy of fire insurance, a manufacturer or trader will venture his capital to a larger extent than he would otherwise deem it prudent to do if it were at the mercy of adventitious chance.[1]

Theoretically, fire insurance is nothing more than an arrangement for sharing the loss caused by fire, for the theory underlying the practice of fire insurance is to *distribute* the loss caused by fire so that it does not fall entirely upon one individual—who, as a rule, is in no way responsible for the loss, and could not have foreseen or prevented it,—but is shared by several, who are all exposed to the same loss. If a number of persons, each exposed to the risk of the same loss, arrange among themselves that when one of their

[1] See infra, page 305.

number becomes involved in the loss it shall be shared by all of them, that is a form of insurance: each person comprising the group becomes an underwriter of the loss. The same idea underlies the modern practice of insurance. The accumulated premiums which are paid for fire insurance protection furnish the resources out of which fire losses are paid, and consequently these premiums represent the contribution of each insured towards the loss which another may suffer, for the premium which any single policy-holder pays not only purchases security for himself, but assists also to provide the same security for some one else. It is in this way that the individual loss is distributed among all those exposed to the same loss and who seek similar protection for themselves; and by the system of rating adopted in modern practice—whereby the premium required for any individual risk is governed by the loss experience of its class [1]—each policy-holder is made to contribute to the losses of his own group or class, his contribution in this way being proportionate not only to the value which he is in risk of losing, but proportionate also to his risk of losing it.

It is necessary, however, if fire insurance is to function successfully, that it should be governed by certain fundamental principles. A fire, as has already been pointed out,[2] is a fortuitous event; that is its essential characteristic. No risk is immune from damage or destruction by fire; and although the insured may not be able to say how

[1] See infra, page 285. [2] See supra, page 6.

the fire originated, that in itself does not preclude him from recovering his loss. So long as it is a fire as contemplated by the contract, involving the property described in the policy, and the insured suffers a loss in consequence, he is entitled to be indemnified by his insurers, who, if they repudiate liability for the loss, must show good cause for doing so. Moreover, by the terms of the contract, the insurer undertakes to pay to the insured a sum of money equivalent to the loss sustained, with an option—rarely exercised, however, and then only in very exceptional circumstances—to reinstate. These things being so, a fire policy in the hands of an unscrupulous person might readily be utilised by him for purposes of profit and gain, thus defeating the essential purpose of fire insurance, which is to give *indemnity* for loss. A contract of fire insurance, however, is so hedged round by inalienable principles as to make such practices wellnigh impossible, or, at all events, extremely dangerous for the person who attempts them. What these principles are is discussed in the next chapter.

CHAPTER II.

THE GOVERNING PRINCIPLES IN FIRE INSURANCE.

A CONTRACT of fire insurance is essentially one of *indemnity*—that and nothing more. Were it anything else than a contract of indemnity, fire insurance would be impossible, for "this rule (the rule that 'the satisfaction ought not to exceed the loss') was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses."—(Lord Mansfield: *Godin* v. *London Assurance Co.* (1758).) The insured is indemnified for his loss, and the actual loss which he has sustained is the limit of the compensation to be paid. The "sum insured" stated in the policy is the maximum amount which the company can be called upon to pay, but the "sum insured" is of secondary consideration to the principle of indemnity, which takes precedence before all else. It is the principle of indemnity that adjusts the amount the insured can recover in respect of his loss; it circumscribes the contract, and eliminates all that is extraneous and not germain to the aim and purpose of the contract. It is, as Lord Justice

Brett said, a "fundamental principle" in fire insurance.[1]

In order to recover under a fire policy the insured must show that he has sustained a loss through the damage or destruction by fire of the property described in the policy, and that his loss arises from the interest—whatever the nature of it may be—he possesses in the property.[2] The indemnity to which he is entitled will be measured by the extent of the loss he has thus sustained, within the limits of the sum insured. It follows, therefore, that if the insured has sustained no loss he cannot be indemnified. Either has his interest in the subject-matter not been such as to involve him in any loss, or he may have recovered his loss in some other way, or it may be that he has parted with what interest he did possess in the property, and, consequently, has sustained no loss through its destruction. If, however, the insured does suffer a loss, he is entitled to indemnification to the full extent of his loss up to the sum insured; but if his loss is diminished in any way, the amount recoverable under the policy must be correspondingly diminished. That is the essence of the principle of indemnity as applied to a contract of fire insurance, and it is settled law that a contract of fire insurance can only be interpreted as one of indemnity. Before, therefore, the contract can operate, the fire must result in a *bona-fide* loss to the insured. If it does not have that effect—if the fire has not been to his detriment,—the event

[1] See supra, page 3. [2] See infra, page 17.

provided for in the contract has not arisen and the contract remains inoperative, for there is then nothing for which the insured can be indemnified.[1]

As the principle of indemnity restricts the amount which the insured can recover under the policy to what he has actually lost through the damage or destruction by fire of the property described in the policy, it follows :—

1. That if he has effected an insurance relating to the same subject-matter with more than one company—what is known as *double insurance*, or with the same company but in excess of the value of the property, known as *over-insurance*—he cannot be indemnified beyond his actual loss. He may take out as many policies as he likes—there is nothing to hinder him from doing that,—and pay as much premium as he feels inclined to pay for over-insurance, but he cannot recover more than the value he has lost. Because the insured has paid premium for a certain amount of insurance does not entitle him to that amount in the event of a fire, unless his loss is to that extent. In this aspect of it fire insurance differs from life assurance, which assures the payment of a stated sum on the happening of a specified event.[2] A similar undertaking in fire practice would be called a *valued* policy,[3] but the issue of valued policies is exceptional. There is usually a condition in a fire policy—known as the *Contribution Condition*—which makes provision for the allocation of the

[1] See infra, page 25. [2] See infra, page 235 (note 1).
[3] See infra, page 376.

loss where insurances have been effected by the same insured for the same subject-matter with more than one company. The condition has the effect of distributing the loss amongst the various companies in ratable proportions to their liabilities. But even if the condition were absent, the insured could not be indemnified except to the extent of his loss. He might select the company against whom to make the claim, and the company would be bound by the terms of its contract to meet the loss; but the fact that he had paid premium for a double insurance would not entitle him to recover more than his actual loss. If he received a full indemnity under one policy, he could have no claim against the others. As, however, the contribution condition almost invariably appears as one of the conditions of a fire policy, no question can arise. The insured is given no option, and a company's liability is restricted to a ratable share of the total loss.[1]

2. As the loss against which fire insurance is intended to provide is loss of capital values represented by the property described in the policy *measured by its actual market value at the time of the fire*, it is this value, the real or intrinsic value, that determines the loss, and anything beyond that is not recognised by the principle of indemnity. The amount recoverable in respect of the fire is the value which the fire has destroyed, based on the market value of the property at the time of the fire. An article of furniture, a picture, or some

[1] The condition is discussed more fully in chapter vii.

piece of jewellery or plate, may possess a certain value to the owner above the market value by reason of the associations that centre round it; but sentiment is not a marketable commodity, and does not affect the intrinsic (or market) value of the particular article. An heirloom may be in the eyes of the owner a very valuable thing, but the price it would fetch would only be what a merchant would care to pay for it, irrespective of any sentiment attaching to the possession of the heirloom; and so a fire policy, operating on the principle of indemnity, would pay for such an article only what it would fetch in the market. Sentimental value (*pretium affectionis*) is disregarded. Everything also of a prospective nature is eliminated, such as, *e.g.*, the value which the property might have acquired at some later date owing to a rise in market prices, or the benefit which the insured hoped to derive at some future time from the sale of it, but which, owing to the fire, has been lost. The only value which is considered is the present value judged by market standards—in other words, and stating it briefly, what the property would have realised had it been sold instead of being burned.[1]

3. That the loss which the insured has sustained must arise from the interest he possesses in the property, either as actual owner, or by reason of some liability which he has to the real owner, or

[1] An exception to the rule is made in the case of valued policies (see infra, page 376). In the case of buildings, the cost of reinstating is taken as the measure of the loss (see infra, page 317).

his interest may depend on other things; but whatever the nature of his interest may be, it must be such that a fire will leave him a loser.

4. That if the insured possesses any rights against a third party for recovery of his loss, the company becomes *subrogated* to these rights, for the principle of indemnity requires that if an insured incurs a loss but has his loss diminished by a payment from a third party, he is bound to account to the company for the amount thus received. The *doctrine of subrogation* prevents the insured from accepting a double remedy for his loss—from his insurer, and also from the person primarily liable to him for the loss. He is bound to exercise his remedy against the latter, just as he would have done had there been no insurance; but having been indemnified under his policy, he must credit his insurer with whatever sum he recovers from other sources.[1]

A contract of fire insurance must of necessity be of a *personal nature*. This is an essential attribute of it. The agreement is between the company and the insured, who is designated in the policy, and who is presumed to be the owner of, or to possess some interest in, the subjects stated in the policy—a presumption which becomes an implied condition of the contract precedent to validity, for a contract of fire insurance presupposes that the insured has what is called an "insurable interest" in the subject-matter of the insurance,

[1] The doctrine of subrogation is considered at greater length in chap. ix.

capable of being prejudiced by the fire. An insurable interest, in whatever way established, so long as it is such an interest as will involve the insured in a loss if a fire occurs, is necessary to the validity of the contract, for without it the contract would be nothing better than a wager and illegal—incapable of being enforced against either party. The mere happening of the event contemplated by the contract—*i.e.*, the fire—does not *ipso facto* give the insured the right to the proceeds of a fire policy. The test of his right to the benefits of the insurance is whether the fire has been detrimental to him, as can only be the case when his interest in the property is such that the fire has involved him in a personal loss. It is to indemnify him for that loss that the contract exists, and consequently, if the property no longer belongs to him, or if he ceases to have any interest in it, or any liability in connection with it, there is no longer any need for the insurance. The policy becomes non-effective when the insured's interest in the property ceases. The company may continue the contract for the benefit of the new interest, and in ordinary practice it does. This, however, is optional on the part of the company, and use and wont do not in this case create a precedent. The only exception to this rule against alienation of interest is where the interest passes by the operation of law—as in the case of trustee, judicial factor, and so on,—or where it is transferred by will. In all other cases, unless the company's consent to a transfer of interest is signified

by an endorsement on the policy, the insurance ceases when the insured's interest ceases. *Insurable interest* must be established, otherwise the insurance is of non-effect.[1]

A contract of fire insurance is one in which the observance of the utmost good faith—*uberrima fides*—by both parties is of vital importance. In considering this question of good faith in relation to fire insurance, it should be borne in mind that, while the contract contemplates the possibility of an outbreak of fire, and makes provision against the consequences that would ensue upon the issue of that event, it assumes that both the insured and the company have an equal desire that the fire should *not* take place, for if it does both will be prejudiced by it. The insured does not effect a fire insurance with a view to making a profit out of it, but to ensure that he will not suffer a loss, and it is to relieve him of the loss he would suffer by a fire that the company makes the contract with him. The safety of the subject-matter of the insurance concerns both parties more or less equally, since if it is destroyed both will lose by it; for although his direct pecuniary loss will be made good to him by his insurers, the insured will have lost the use and enjoyment of the property, besides incurring a loss in other directions not covered by his policy.[2] Because there is this mutuality of interest, there should exist also

[1] For what constitutes insurable interest see chap. x. See also page 95 for alienation of interest.

[2] See infra, page 33.

mutual confidence between insured and insurer. There should be no element of suspicion in a contract of fire insurance, which is not one where the maxim of *caveat emptor*—let the purchaser beware—has any place. Neither the insured nor the insurers should have anything to conceal from each other, and, as a matter of fact, the contract implies that nothing material shall be concealed or anything be done by either of them that will be to the prejudice of the other.

How necessary is the observance of the duty of good faith, especially on the part of the insured, will be readily understood when it is considered that the company and the insured are not equal —*ad idem*—in the personal knowledge they each possess of all the circumstances attending the risk that is being undertaken. The company accepts the insurance and fixes the rate of premium to be paid, according to the circumstances existing at the time the contract was negotiated, and on the information which the insured has furnished, supplemented, it may be, by additional information which the company finds out for itself. The duty of good faith, therefore, requires the insured to disclose all material facts affecting the fire hazard. The company relies upon the insured to acquaint it of everything likely to affect its estimation of the risk, and consequently, if the representations and statements which he makes at the time of effecting the insurance are false or misleading, or if he fails to make a full disclosure of everything in connection with the risk or the

proposal likely to influence the company's judgment, he is guilty of a breach of the duty of good faith, and the contract is rendered void *ab initio*, for the contract is based upon the understanding that everything material shall be communicated to the company. It does not alter the case that the insured was not aware that some particular fact or circumstance ought to have been disclosed, or that he unintentionally or inadvertently misled the company. The fact remains that it *was* misled into an estimate of the risk contrary to what it actually was, and that it was induced into accepting a liability it would otherwise have avoided, or accepted only at a higher premium.

The whole aim and purpose of the rule of good faith is summarised by Lord Mansfield in the case *Carter* v. *Boehm* (1766), when he says: "The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which one privately knows and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, whether there was, under all the circumstances at the time that the policy was underwritten, a fair representation, or a concealment, fraudulent if designed, or, though not designed, varying materially the object of the policy and changing the risk understood to be run."

Although the duty which is thus laid upon the insured relates particularly to the time he makes the proposal, it does not end there. His duty

continues throughout the whole currency of the insurance. This is provided for by conditions or warranties on the policy, such as, *e.g.*, those relating to misrepresentation and concealment; alterations and removal; and the procedure to be followed when a loss arises. If any of these express conditions are violated, or if the insured is guilty of a breach of any warranty, or if the company's liability is increased unknown to it by any act or omission on the part of the insured, the company is relieved of liability, whether the fire was caused thereby or not.[1]

But the company also must deal fairly with the insured. Any representations it may make, or any advantages it may offer, with a view to inducing him to make the contract with it must neither be false nor misleading; and having induced him to make the contract, it may not burden it with intolerable or impossible conditions, or employ ambiguous terms and expressions capable of a double meaning, for in every case of ambiguity the courts will interpret the contract in favour of the insured. There must not be anything of the nature of sharp practice, either on the part of the company or the insured. Their interests are mutual, and this being so, there should exist mutual confidence between them.

Although it may appear to impose a difficult and onerous duty on the insured, yet the rule that in a contract of fire insurance absolute good faith must be observed is essential, as will be

[1] See infra, chap. v.

readily understood if it is considered what the position would be were it absent. If it were possible with impunity to mislead the insurers into believing that certain things profoundly affecting the risk offered to them were non-existent, thus inducing them to enter into a contract they would otherwise have avoided, fire insurance would be impossible, for no scheme of fire insurance can succeed if it is utilised for purposes of dishonesty and fraud. Or if fire insurance were attempted under such conditions, it would become such an incitement to fraud and wrongdoing that it would not long be tolerated.[1]

It is these essential characteristics of it—viz., that it is one of indemnity only, that it is of a personal nature, and that it is one in which absolute good faith must be observed—that distinguish a contract of fire insurance from a wager. Although it resembles a wager in respect that it is a contract to pay a sum of money upon the happening of a specified event—an event which may or may not happen, and is, therefore, uncertain,—unlike a wager, what is paid under a fire policy is nothing more than the loss which the insured has sustained through the happening of the event, and the loss must arise from his interest in the subject-matter. In the absence of such interest there is no obligation to pay, since insurances by way of gaming or wagering are illegal. The insured's interest in the subject-matter determines his right to insure and to recover under a contract of insur-

[1] See further chapter v.

ance. The event contemplated by the contract must, *prima facie*, be adverse to the interests of the insured. The contract becomes invalid otherwise.

A wagering contract is made with a view to securing a profit—it has no other object beyond that. There is no question of indemnity, for what is paid to the winner is not paid by way of indemnity, whereas to give an indemnity for a loss sustained by the happening of the event is the sole purpose of a fire-insurance contract. This being so, neither party can make a profit, since the one who suffers the loss by the event has his loss made good by the other, and who will be the loser is known beforehand. In a wagering contract the winner and the loser are not known until the event has taken place.

The only interest which the parties to a wager have is in the happening of the event and the issue of it, and what they will win or lose by it. They have no other interest beyond that, and their interests are conflicting. In a contract of fire insurance, on the other hand, both the insured and the insurer have an interest in the subject-matter, and an interest also in not desiring the event to take place, for neither of them has anything to gain by it. The insured would lose by the event, and it is in order to be relieved of the loss that he has made the contract with the insurer, who is legally bound to take up the loss and relieve the insured of it. In a wagering contract the interest of the parties lies entirely in the issue

of the event; in a fire-insurance contract the interest lies in the fact that should the event happen a loss will be sustained. Fire insurance is not effected for the sake of deriving a benefit out of the insurance, but for protection against loss. Fire insurance is a legitimate transaction, and is recognised as such by law.

CHAPTER III.

THE CONTRACT.

A POLICY of fire insurance provides for the payment of a sum of money as representing the pecuniary loss incurred by the insured through the damage or destruction by fire of the property described in the policy; or alternatively, the restoration or replacement of what has been damaged or destroyed. That is the purpose of the contract—to indemnify the insured for his loss by a payment in money or in kind. But before an insured can recover under a fire policy, the following things are essential:—

1. He must have suffered loss.
2. The loss must have arisen through a fire within the meaning of the policy.
3. The fire must have damaged or destroyed the property described in the policy.
4. The policy must be a binding contract capable of being enforced against the insurers.

The first thing necessary is for the insured to show that he has suffered a loss. If he cannot do that he can have no claim against the policy,

for there would then be nothing for which to indemnify him. It is possible that there may be a fire within the meaning of the policy, and that the fire has damaged or destroyed the property specified in the policy; but that alone is not sufficient to entitle the insured to the benefits of the policy, for in the absence of any loss the contract remains inoperative, since the contract exists to give indemnity for a loss. Before, therefore, the insured can claim against his policy, he must establish the fact that he has suffered a loss by the fire.

The contract does not merely undertake to pay to the person whose name appears in the policy a sum of money equivalent to the value of the property which has been damaged or destroyed by the fire. The root principle of the contract is *indemnity*,[1] but indemnity presupposes a loss—the dictionary meaning of the word is compensation for loss. While, therefore, a policy of fire insurance is a provision to pay a sum of money in the event of a fire destroying or damaging the property described in the policy, the amount of the compensation or indemnity to be paid *is the loss which the insured has suffered*. The undertaking provides that, in the event of loss or damage by fire happening to the property described in the policy, the company will pay or make good to the insured the value of the property destroyed, or the amount of the damage done by the fire. But it is implied in the contract that the insured has something

[1] See supra, page 11.

to lose by the fire, and it is the personal loss which the insured has suffered as a result of the fire, that is covered, ascertained by the value which the fire has destroyed. It is the personal loss that determines the amount of indemnity to be paid. In the majority of cases the loss will be correlative with the value destroyed; but it may not be so in every case, as, *e.g.*, where the insured has only a limited interest in the property.[1]

The loss which the contract provides for is the loss to the insured arising from the damage or destruction *by fire* of the property described in the policy. The expression "loss or damage by fire" used in a fire policy is to be construed in its popular sense—*i.e.*, the sense "in which a plain man would understand" it. "The words of the policy are to be construed, not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense."—(Kelly, C.B.: *Stanley* v. *Western Insurance Co.* (1868)); and Mr Justice Byles in the Erith explosion case (*Everett* v. *London Assurance Co.* (1865)), stated that "'Loss or damage occasioned by fire' means 'loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is': in the one case there is a loss, in the other a damage, occasioned by fire."[2]

In the action which arose out of the Erith explosion, counsel for the insured sought to read into the term "fire" a narrower and more scientific meaning than that ordinarily understood; but

[1] See infra, page 195.

[2] See infra, page 56.

the Judge (Byles) disallowed this, stating that "unless there is some reason to the contrary, the words 'loss or damage by fire' must be construed according to the ordinary rules." In order, therefore, to constitute a "loss or damage by fire" within the meaning of the policy, there must be actual ignition or burning of the property insured, for that is the sense in which the term "fire" is ordinarily understood, and so long as it is a loss or damage by fire in that sense, it matters not how the fire was caused, provided, however, that it is fortuitous in origin,[1] brought about accidentally without the insured's connivance or privity, and is not a fire which is expressly excluded by a condition of the policy.[2]

Its essential characteristic is that it must have been caused accidentally, the insured having had no concern in bringing it about. It may have been due to carelessness, either on the part of the insured, or of his servants, or of strangers; nevertheless the loss occasioned by it would be covered by the policy. Even if it amounted to wilful fire-raising or incendiarism—the insured not being privity to the act,—that would be no bar to a claim under the policy.[3] But unless the fire owes its origin

[1] This, however, does not exclude incendiarism, unless incendiary fires are expressly excluded, as they sometimes are in Ireland.

[2] See infra, chap. iv.

[3] If, however, the insured himself, with intent to defraud the company, wilfully sets his property on fire, or connives at it, the company can repudiate liability on the ground of fraud, and the insured would be guilty of a criminal offence.

to an accident, it is not a fire within the meaning and intention of the policy. Thus, a fire lit in an ordinary fire grate, or in the furnace of a boiler, or in a vessel or other appliance where a process requiring the application of heat is carried on, is not an accidental fire, and any damage caused by such a fire within the limits in which the fire is confined would not be covered by the policy, for there would be nothing fortuitous about it. If, *e.g.*, owing to excessive heat, or through negligent supervision, the article which is being submitted to the heating process is destroyed, such as cloth on a singeing machine, or sugar in a boiling-pan, or earthenware in a baking-stove, or grain on a kiln floor, and so on, such damage would not constitute a loss within the meaning of the policy. "I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiff's loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat: and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. . . . In this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. . . . This is not a fire within the meaning of the policy, nor a loss for which the company undertake." Such

was Judge Gibb's decision in the *Austin* v. *Drew* case (1815), an action which was raised to enforce payment for damage done to sugar by heat and smoke during the process of refining.[1]

If, however, a fire of this description were allowed to escape beyond its proper limits, and cause an outbreak of fire elsewhere, the loss caused in this way would be a "loss or damage by fire," for then the fire would be accidental in origin; *e.g.*, the heat from a drying stove might ignite a wooden beam, or a spark from an ordinary room grate set some article of a combustible nature alight. This would be accidental ignition, and covered by the policy. "Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable."—(*Austin* v. *Drew*, supra.)

But in order to establish a claim under the policy, it is not sufficient merely to prove that the loss is attributable to a fire. The fire may have only a remote connection with the loss, as where the damage is caused by concussion from an explosion caused by a fire. The loss undoubtedly could be traced back to the fire as being the active agent which set in motion the train of events which brought the loss about, for if the fire had not broken out the explosion would not have occurred, and there would have been no loss. The question, however, is whether the fire is the *efficient*

[1] It is usual for a fire policy to contain a condition relieving the company of liability in the case of goods being destroyed or damaged while undergoing any process by which the application of artificial heat is necessary. See chap. iv.

proximate cause of the loss, or whether it is simply the remote or indirect cause which brought into action other agencies which, acting independently of the fire, caused the loss.

"Proximate cause" has been defined as "the active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force, starting or working actively from a new or independent source." The fire must be the immediate, or dominant cause, and not the remote or distant cause, in accordance with the maxim—*causa proxima non remota spectatur* (the immediate or proximate cause, and not the remote or distant one, should be looked to). The loss must be brought about as the direct result of the fire, in a direct relation of cause and effect—the fire being the cause of the loss, the loss the effect of the fire,—and not through the intervention of some new agent which, although brought into action by the fire, works independently of it to produce the loss. In that case the loss would be only indirectly attributable to the fire, the active, or dominant, cause being the new event which the fire had set in motion, and which was accidental to the fire, and not the natural consequence of it. The expression "efficient proximate cause" embodies the conception of immediateness and effectiveness, the fire being the immediate or direct cause as distinguished from the remote or indirect cause in a chain of causation, and also the effective cause capable of itself to produce the loss without the intervention of

any new or independent cause. The term "immediate" does not necessarily imply that the fire must be nearest to the loss in a sequence of events. So long as the fire is the dominating cause, and the other events in the sequence are merely contributory and following the fire as a natural and inevitable consequence of it, then the fire may still be the proximate cause of the loss or damage.[1]

If the loss has no connection with the fire except that the fire produced a condition of things whereby a loss is incurred, the fire is not the proximate cause, but only the cause of the cause of the loss. It has been held, *e.g.*, that where a mob broke the windows of a shop in the neighbourhood of a fire for purposes of looting, the proximate cause of the loss was the act of the mob and not the fire (*Marsden* v. *City & County Assurance Co.* (1866)); and again, where after a fire the walls were left standing in a dangerous condition, and at a later date were blown down by a violent gale, causing damage to adjoining property, the gale and not

[1] For examples of this see infra, page 36. See also infra, page 56. The doctrine of proximate cause assumed considerable importance during the war, chiefly in connection with marine insurance, and Lord Shaw, in the course of his deliverance in the case *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society* (1918), defined proximate cause as the real "efficient cause to which the event may be ascribed." Proximate, he pointed out, does not mean proximate in point of time, but proximate in efficiency. The cause may still be the efficient cause, although other causes may arise which do not destroy or impair the effectiveness of the dominating cause. (See Bunyon's 'Law of Fire Insurance,' 7th Ed., page 171.)

the fire was held to be the cause of the damage.[1] Had the walls fallen during the progress of the fire, or soon after, the position might have been different, for then there might have been "loss or damage by fire."[2] It is the immediate cause of the loss that must be considered, not "some remote or speculative cause."—(*Everett* v. *London Assurance Co.*—Erith explosion.)

On the same principle—viz., that the fire is not the immediate or proximate cause of the loss,—any contingent or consequential loss which the insured may suffer through the fire is not a loss or damage by fire within the meaning of the policy. Such loss is not the direct, but the accidental result or consequence of the fire, and arises from the effects of the fire upon the subjects insured. A loss of this nature, where the fire is only the remote cause, may occur in various ways. The insured, *e.g.*, may suffer a loss of the profit which he expected to earn from the use or enjoyment of the property, but of which he has been deprived owing to the fire having so damaged or destroyed the property that he is unable to carry on the particular trade or business out of which his profit was earned.[3] The

[1] *Gaskarth* v. *Law Union Insurance Company* (1876).

[2] As in the case *Johnston* v. *West of Scotland Insurance Company* (1828), where a dangerous wall left standing after a fire was ordered to be pulled down, and in the course of demolition fell, damaging adjoining property. The damage so caused was held to be loss or damage by fire within the meaning of the policy. (See also infra, page 36.)

[3] The loss of trading profit as a result of fire can be insured under a separate contract: what is known as a "loss of profits," or a "consequential loss" policy.

immediate cause of the loss which the insured sustains in this way is not the fire but the destruction of the property, the fire being only the remote or indirect cause of the loss. The insured, however, in order to keep his business going and maintain his profit, may require to incur an expenditure he would not have incurred but for the fire. He may have to rent other premises until his own are restored, or to enable him to supply his customers it may be necessary to get part of his work done by some one else, and in other ways the fire may involve him in an expenditure that would not have been necessary had the fire not occurred. He will very probably require to expend more in replacing machinery which the fire has destroyed than he has recovered under the fire policy;[1] but these additional charges and increased costs, although losses which the insured has incurred in consequence of the fire, are accidental losses not directly attributable to the fire, but to the effects of the fire upon the insured's trade. Further, it will likely happen that, although the fire has deprived him of the use of the property, the insured will still require to meet certain charges in connection with the property or in connection with the business he was carrying on, such as rent, rates, taxes, wages, interest on loans, &c. These, as long as the insured was able to carry on his business, were remunerative charges, for they assisted him to earn his profit; but owing to the fire they are no longer remunerative, and conse-

[1] See also infra, chap. xvii.

quently the payment of these is a loss which the insured has suffered in consequence of the fire.[1] This loss, however, is not the direct result of the fire, but is owing to the dislocation which the fire has caused in the insured's business. A further loss which the insured may suffer, and which is only indirectly associated with the fire, may arise from the depreciation of some part of the property which, although not directly affected by the fire, has diminished in value, or is rendered useless as a result of it. The loss covered by a fire policy relates only to what is *actually* damaged or destroyed by the fire—that is to say, what the fire has consumed,—and consequently, if material in process of manufacture is rendered useless or is damaged owing to the fire having interrupted the process, such loss would not be covered. The material has not been damaged or destroyed *by fire*, and the loss to the insured from such damage or destruction of the material is not proximately caused by the fire.

Loss of rent is the only exception to this rule against consequential loss, for it is common practice to insure against loss of rent through the building becoming untenantable owing to fire. More than this, what is known as consequential loss of rent is sometimes insured, the rent, *i.e.*, of some building rendered useless for its proper purpose owing to a fire in some other building. For example, if the granary at a flour mill were

[1] These can be insured as "standing charges," under a loss of profits policy.

destroyed by fire the mill might be thrown idle, for the miller might have nothing to grind; but no claim for loss of rent could be made under the item of the policy covering the rent of the mill in the ordinary terms, since the mill itself was not affected by the fire, consequently—chiefly in manufacturing concerns where the need for it is present—consequential loss of rent may be insured under an ordinary fire policy.

If, however, the loss is the natural, as distinct from the accidental, consequence of the fire, then, although the property may not have been actually set on fire, the proximate cause of the loss would nevertheless be the fire, *e.g.* :—

(*a*) Damage to adjoining property by falling material either during the fire or immediately after, but not, as has already been noted,[1] some time after, when, owing to their weakened state, the walls were blown down by a violent gale.

[1] See supra, page 32. The position with regard to the damage done to adjoining property by the fall of the ruins left by a fire would appear to be governed by the particular circumstances of the individual case. Where the walls fall during the progress of the fire or within a reasonable time after, no question can arise. The fire is the dominant effective cause, the fall of the walls being incidental to the fire and the natural consequence of it. The decision in the case *Johnston* v. *West of Scotland Insurance Company*, cited in note 2 to page 33, would appear to infer that if the walls fall in consequence of their weakened state as a result of the fire then the fire, although possibly the remote cause in point of time, might, nevertheless, be held to be the dominant cause. Should, however, some other agency intervene, but for which the walls would not have fallen, then the fire can no longer be regarded as the efficient proximate cause of the loss.

(*b*) Smoke damage from the fire, or damage done by water during extinguishing operations.

(*c*) Damage caused in other ways by the measures taken for checking the progress of the fire, even to the extent of blowing up a building with a view to arresting the spread of the fire. This is provided for in the Metropolitan Fire Brigade Act, 1865, in connection with fires in the Metropolitan Area, but the same rule applies elsewhere.

(*d*) Damage during salvage operations. If goods are removed from a burning building to a place of safety, and become damaged in the process, such damage would be covered by the policy as "loss or damage by fire." This applies also to goods removed from a building within danger from the fire, but not to goods removed from a building to which there was no reason to apprehend any danger. It applies also to deterioration, as when live stock are removed out of danger of the fire, and through exposure to the weather become depreciated in value.

(*e*) Blistering, scorching, or cracking of adjoining property by the heat from the fire. A serious fire may cause damage to property near, although it may not result in any actual outbreak of fire in such property. If the heat from the fire cracks the windows, or scorches or blisters outside woodwork or

paint-work of such adjoining property, such damage is "loss or damage by fire."

(*f*) Loss or damage caused by lightning, whether fire results or not, is held to fall within the scope of the policy, and, as a rule, a fire policy contains a clause to that effect.

Whether the expenses incurred by the insured in extinguishing a fire come within the scope of the contract would seem to be doubtful. In practice the companies pay these expenses where they can legally be enforced against the insured, but the payment is regarded as of the nature of a gratuity, and is not looked upon as forming an item of the claim under the policy.[1]

Welford and Otter-Barry, in their 'Law of Fire Insurance,'[2] summarise the position in these terms: "Though the assured must show that he has sustained a loss by fire within the meaning of the contract before he can recover against the insurers, it is not necessary for him to show that the property insured has actually been burned or damaged by fire. It is sufficient if he succeeds in proving that fire was the proximate cause of his loss, since every loss of property which clearly and proximately results, whether directly or indirectly, from a fire is within the contract." The contract, however, as has already been stated,[3] has no relation to those various losses which must inevitably follow upon a fire; but if the property specified in the policy

[1] See infra, page 339.

[2] 'The Law relating to Fire Insurance' (1921 Edition), page 62.

[3] See supra, page 33.

is lost or damaged as the result of the action of fire, thereby involving the insured in a loss he would not have incurred had there been no fire, then the loss is covered by the policy so far as the loss relates to the property as described in the policy. But where the loss is the result of a fire arising from an "excepted peril,"[1] the contract is inoperative, even although the original fire spreads to other property, for "where a fire spreads in the natural and ordinary course of events from one excepted fire the exception applies to the spreading fire no less than to the original fire."—(Mr Justice Bigham : *Tootle, Broadhurst, Lee, & Co.* v. *London & Lancashire Fire Insurance Co.* (1908)—Jamaica earthquake fires.) If, however, the spreading fires do not arise in the natural and ordinary course from the original fire, but have been brought about accidentally, even although the accident is related to the original fire, the exception would not apply, and such fires would fall within the contract.[2]

The indemnity granted by the policy relates only to the direct loss which would arise from a fire damaging or destroying *the property as it is described in the policy*, commonly, although erroneously, spoken of as the "property insured." The undertaking of the company to indemnify for loss has no concern with any other fire than what involves the "property insured," for it is the physical object as described in the policy that forms the subject-matter of the insurance. Consequently, the de-

[1] See infra, chap. iv. [2] See infra, chap. iv.

scription of the property given in the policy is of the utmost importance, for it is an implied condition of the contract—and its validity depends upon compliance with that condition—that the property insured is correctly and adequately described, so that when a fire happens the description contained in the policy will be sufficient to identify the property affected by the fire as being the particular physical object to which the insurance was intended to apply.[1] If, therefore, the property affected by the fire differs in any material respect from the description of it given in the policy, the company would be relieved of liability. Were it otherwise, it might be possible for an insured to recover in respect of property to which the insurance never did and never was intended to apply. Moreover, as the loss must have arisen through the destruction or damage of the property *at the place stated in the policy*, it is also important that the situation of the risk should be correctly stated, since it forms a part of the description of the "property insured."

Unless its particular terms expressly show it to be such, a policy is not a *blanket* policy—*i.e.*, one covering different kinds of property in one sum, such as buildings, machinery, and stock; nor is it a *floating* policy—*i.e.*, applying to different places —*e.g.*, goods stored in two or more warehouses and insured in one amount. Consequently, an insurance applying to buildings cannot include plant or stock, nor a policy covering stock embrace

[1] See infra, chap. v.

fixtures and fittings; neither will a policy insuring goods in a specified warehouse cover a loss in another warehouse. If the policy is a specific one it can operate only in respect of the particular property described in the policy; if it is a floating policy it will operate for all the property included within its range, but in every case the property in connection with which the claim is made must be identified from the description contained in the policy as that to which the insurance was intended to apply.

The subject-matter of the insurance, therefore, being some physical object, the damage or destruction of which by fire will involve the insured in the loss which is provided for by the contract, it is essential that the subject-matter should be so described in the policy, both in regard to its special features and to its location, as to make it clear beyond doubt that it was the particular object to which the insurance was intended to apply, and to which it in fact did apply at the time of the fire, and that the contract covered only the loss which would result from the damage or destruction by fire of that particular object and nothing else. From this it follows:—

(*a*) If a building forms the subject-matter of the insurance and is destroyed, the loss of rent to the proprietor which would result could not be recovered, because the insurance relates to a *building* and not to the *rent* derived from it; nor if an outbuilding were burned would the loss be covered by

a policy which insured only the dwelling-house.[1]

(b) An insured would not be able to recover a loss on shop fittings, &c., under a policy which related only to stock-in-trade.

(c) If a farmer effected an insurance for hay *stacked* on his farm, he could not claim under the policy for hay that was destroyed when *stored in a building.*

(d) If a quantity of wool stated in the policy to be insured in a specific warehouse were destroyed elsewhere, no liability would attach under the policy. If it was the intention to cover the wool wherever it happened to be at the time of a fire, that should have been expressed in the policy; but if the wool was intended to be insured only in the particular warehouse mentioned in the policy, the company is not liable for a loss in any other warehouse, even although there is no difference in the fire hazard of the two warehouses. Thus, in the case *Pearson* v. *The Commercial Union Assurance Co.* (1873), it was held that the company was not liable under a policy which covered a certain steamship lying in the Victoria Docks, London, for the loss of the ship by fire while lying at her moorings in the river.

(e) A policy worded to cover "stock-in-trade,

[1] A modification of this is found in the householders' comprehensive policy (see infra, chap. xvii.).

consisting of" certain specified kinds of goods, would not cover a loss on goods other than those specified. If, however, the policy referred to stock-in-trade generally, and the goods destroyed were consistent with the insured's trade as designated in the policy, the description would be adequate.

In cases where it is not possible to describe the property otherwise than in general terms, such as, *e.g.*, "On the building of one storey, stone or brick built and slated, situate in the village of . . . . and occupied as a private dwelling-house," it is the practice to insert a clause in the policy known as the *Identification Clause*, which declares that the property insured is the only property answering to the description and situation in which the insured is interested. This amounts to a warranty, which would be violated with fatal results if the insured happened to have another property to which the description in the policy would apply equally as well, otherwise if one was insured and the other not, how could the company in the event of a fire distinguish between the one and the other?

When these essential conditions are satisfied, and the insured has established a *bona-fide* claim for loss or damage by fire, he is entitled to the indemnification granted by the policy. If the company then repudiates liability, it must show on what grounds it rests its repudiation, either because the fire is an "excepted peril"[1] and ex-

[1] See infra, page 47.

cluded from the scope of the policy, or because there has been a breach of a condition or a violation of a warranty, or because the insured has not performed the duties laid upon him by the contract, or whatever other reason it has for repudiation; for once the insured has made out a *prima-facie* case of loss or damage within the meaning of the policy, the onus of disproving his rights to the benefits of the policy rests with the insurer.

CHAPTER IV.

THE EXCEPTIONS TO THE CONTRACT.

ALTHOUGH a policy of fire insurance gives indemnity for loss or damage by fire, this is qualified by a condition of the policy which provides that the company will not be liable —

(1) In the event of loss or damage by fire to certain specified kinds of property.

(2) For loss or damage arising from certain specified events, commonly referred to as "excepted perils."

Losses which would otherwise be covered by the policy, or in the absence of the condition might be held to be covered by the policy, are thus expressly excluded. The condition not only stipulates that certain losses, although actually caused by fire, are excluded from the scope of the policy, but provides also that losses caused by certain perils, which in the absence of anything to the contrary might be regarded as fire or analogous to fire, are not losses by fire within the meaning of the policy.

Such property as deeds, bonds, bills of exchange, promissory notes, money, securities for money, stamps, or books of account, is excluded altogether

from the insurance.[1] These things have no value in themselves. Their value consists simply in what they represent, or in the information they contain, or in the advantages they confer on the owner of them, or in the pecuniary benefit to be derived from them. Apart from that, they have no value to which the ordinary rules of value could be applied. Gunpowder and explosives are also excluded; while medals, curiosities, manuscripts, prints, paintings, drawings, sculptures, patterns, models, moulds, plans, and designs are not covered unless specially mentioned. These are articles of a special nature, and sometimes difficult to value.[2] Nor is property which is held by the insured in trust or on commission covered unless the policy specifically mentions the fact. Consequently, if the insured receives into his custody property belonging to other people, such property would not be covered by his policy unless specially mentioned in the policy. It is usual, however, where goods held in trust or on commission are insured to add the qualifying expression, "for which the insured is responsible," so that the insured is precluded from recovering in respect of such goods unless he has contracted liability to the owner of them for their safety. It is this liability which gives the insured an insurable interest in such property,[3] and enables him to recover under the

[1] A modification of this is made in the case of the householders' comprehensive policy. See chap. xvii.

[2] See also chap. xvi.

[3] See infra, chap. x

policy in the event of a fire damaging or destroying the property; but to enable him to recover, the policy must specifically state that property held by the insured in trust or on commission is covered, and whatever sum is paid under the policy in respect of such property is held by the insured in trust for behoof of the lawful owner.

The condition excludes also loss or damage occasioned by, or in consequence of, invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, earthquake, volcano, subterranean fire, explosion and spontaneous combustion, and loss or damage to property while undergoing any process requiring the application of artificial heat.

Where the loss is one that is covered by the policy, the cause of the fire which has occasioned the loss is immaterial, except when the fire is caused wilfully by the insured himself or with his connivance. Where, however, the fire originates from an "excepted peril," the cause does become material, and while it is sufficient for the insured to prove that there has been a fire, it is for the company to prove, although admitting the fact of the fire, that it was of a kind expressly excluded from the scope of the policy—in other words, that the fire arose from an "excepted peril." [1]

[1] The company must still discharge this onus even where the policy contains a condition which lays upon the insured the onus of proving that his loss was not occasioned by the "excepted peril." See, *e.g.*, the case *Boggan* v. *Motor Union Insurance Co.* (1921), page 67.

The excepted peril may either be akin to fire, or it may be an actual outbreak of fire, but of a kind the company deems it prudent to exclude. The first class relates to losses arising from —

(*a*) Spontaneous combustion or natural heating of the subject-matter.

(*b*) Property subjected to the application of heat.

(*c*) Explosion.

(*a*) *Spontaneous combustion*, or natural heating, is the heat generated within the substance by its own natural properties without the intervention of any external heat. The chemical action which takes place within the substance evolves heat which may, if the conditions are favourable and the heat not arrested, result in an outbreak of fire. Certain classes of coal, *e.g.*, have a tendency to heat when binged in large quantities, owing possibly to the oxidation of certain properties in the coal. If the oxidation is allowed to proceed, the temperature inside the bing will rise till the combustion point is reached, when fire will ensue. An ordinary fire policy would not cover a loss of this nature, for spontaneous combustion is not a "fire" in the ordinary and everyday sense of the term.[1] It is the result of chemical action which sets up heat in the substance itself, whereas to cause a fire in the ordinary sense the application of external heat is required. But as spontaneous combustion is really the only risk attending a bing of coal, it is usual to extend the policy to include spontaneous combustion. The extension thus granted is a

[1] See supra, page 27.

cancellation of the condition which excludes loss arising from natural heating. Hay that has been stacked in a damp state also has a tendency to natural heating. The fermentation which is set up raises the temperature inside the stack, and the combination of chemical changes which thus take place produces a condition of things that may ultimately result in the stack taking fire, but the loss so caused is excluded by the condition of the policy. As, however, the condition usually relates only to spontaneous heating of the article itself, a spreading fire is not excluded. Consequently, if a stack of hay fires spontaneously and sets adjacent stacks on fire, the policy would exclude the original stack, but pay the loss on the others. A *fire* caused by spontaneous combustion is covered by a fire policy. Thus, an entire building and its contents may be destroyed by fire as the result of, say, a quantity of oily waste having spontaneously ignited, and the loss occasioned in this way would be covered by the policy. But where the whole loss is due to the destruction of the substance by its own spontaneous ignition, the negation applies.[1]

(*b*) A fire policy is not liable for any loss that may arise from property becoming damaged or destroyed while undergoing a process requiring the *application of heat*. Thus, if grain is damaged or destroyed while being kiln-dried, the loss caused in this way cannot be recovered under a fire policy.

[1] On the same principle that a marine policy does not cover any loss or damage caused through any defect in the property forming the subject-matter of the insurance.

Should, however, a fire result, the policy would be liable for the loss or damage caused by the fire. Similarly, if cloth is damaged during a process of singeing, no liability would attach to the company for the loss. Such losses cannot be said to have been brought about fortuitously, and, therefore, do not form a proper subject of insurance. If an article in the process of its manufacture, such as pottery or earthenware, requires the application of heat, obviously a fire policy is not intended to cover any damage it might meet with in the process through carelessness or lack of skill. The fire which caused the damage was not an accidental fire, but one that was being used in the process of manufacture.[1]

In this connection it is pertinent to ask whether chimney fires, which are freely paid in some districts, constitute a proper subject of claim under a fire policy. The purpose of a chimney is to carry off the fumes from a fire lighted for the ordinary purposes of a fire. It is understood to be so constructed as to be suitable for its intended use. It is common knowledge that if soot is allowed to collect in the chimney it will take fire. Whether a company could repudiate liability on the plea that a chimney is a thing subjected to a heating process is doubtful; equally doubtful would it be to assert in defence of non-liability that the chimney is an indispensable part of the fireplace, and is "within the usual and proper limits" of a fireplace. A spark from a kitchen fire, say, igniting

[1] See also supra, page 29.

any article near would constitute a legal claim, and similarly, a spark from the same fire igniting an accumulation of soot in the chimney and causing other damage would appear to be an equally legal claim. If damage by chimney fires is not to be paid under a fire policy, they should be included among the "excepted perils"; but a serious difficulty would then arise in the case of a chimney fire which ignited a wooden beam penetrating the chimney and thus carrying the fire elsewhere. As the fire would then have originated in an excepted peril, would the policy be liable for the spreading fire? unless the stipulation is framed in such terms as to make the exception apply only to the chimney, following in this respect the rule in the case of spontaneous combustion. It should be noted that it is made a statutory offence punishable by a fine for any one to set a chimney wilfully on fire. "Every person who wilfully sets or causes to be set on fire any chimney within the limits of the special Act shall be liable to a penalty not exceeding five pounds; Provided always, that nothing herein contained shall exempt the person so setting or causing to be set on fire any chimney from liability to be indicted for felony" (sect. 30, The Town Police Clauses Act, 1847). And section 289 of the Burgh Police (Scotland) Act, 1892, provides that: "Every person who wilfully sets or causes to be set on fire any chimney shall be liable to a penalty not exceeding five pounds; Provided always, that nothing herein contained shall exempt the person so setting or causing to

be set on fire any chimney from liability to be indicted or prosecuted therefor before any criminal court."[1] Where the insured himself is the person guilty of this offence, it would seem contrary to the ethics of fire insurance to indemnify him for a loss caused by his own "criminal" act.

(c) It is not intended that a fire policy should cover losses arising from *explosion* except —

(1) Explosion of illuminating gas in premises not used for the manufacture of gas, and

(2) Explosion of domestic boilers;

but while that is the general principle, the circumstances attending the particular explosion are apt to give rise to complications.

Where the loss is caused solely by concussion from the explosion the position is clear; there is no fire, and no liability attaches under the policy. According to Lord Justice Duke in the *Hooley Hill* v. *Royal Insurance Co.* case (1920), "An explosion independent of fire would not be within the policy at all."

It is when the explosion is attended by fire that difficulties are met with. A fire may cause the explosion, in which case the damage will be partly fire damage and partly concussion damage; or the explosion may bring about an outbreak of fire,

[1] Section 290 of the Burgh Police (Scotland) Act imposes a fine of ten shillings on a tenant who allows a chimney to catch fire, unless he can prove "to the satisfaction of the Magistrate that such fire was in no wise owing to omission, neglect, or carelessness of himself or servants." The tenant is made liable also for expenses incurred in extinguishing the fire "as the same shall be fixed by the Magistrate."

and then the question will arise as to how far the doctrine of proximate cause governs the situation; or the explosion which has been caused by the fire may result in another outbreak of fire—a conjunction of events which still further complicates the position. The loss, therefore, may arise from one or other of the following occurrences:—

(1) Explosion only.

(2) Explosion following upon a fire.

(3) Fire following upon an explosion.

(4) Explosion following upon a fire and followed by another fire.

The first *ipso facto* is at once excluded by the policy condition. There has been no fire, and, consequently, there is no question of liability.

If a fire precedes an explosion and causes the explosion, apart from any other consideration no liability can attach for the explosion damage either to the premises in which the fire occurred or elsewhere, since explosion is negatived by the condition. The company's liability, therefore, cannot extend beyond the actual fire damage, and whatever loss is due to the explosion does not come within the policy. Such was the decision in the *Stanley* v. *Western Insurance Co.* case (1868), the leading case on explosion, and affirmed in the Hooley Hill action already referred to. It might be contended, however, as was done in the latter case, that as the explosion had no origin independent of the fire which caused it, but was incidental to the fire and arose out of it, the company should be liable for the whole damage according to the doc-

trine of proximate cause. It has been laid down, however—and this was argued on behalf of the insurers in the Hooley Hill case,—that "the rule of insurance law as to proximate cause may not apply where there is a special contract."—(Mr Justice Bigham in *Tootle, Broadhurst, Lee, & Co.* v. *London & Lancashire Fire Insurance Co.* (1908).) [1] The policy condition relating to explosion imports something of a special nature into the contract by specifically providing that no liability will attach under certain eventualities, which, in the absence of any such special provision, might be held to come within the scope of the policy.[2] In the absence of any condition against explosion, it might be held that where an explosion has been brought about by a fire and is the natural consequence of the fire, the whole loss is covered by the policy, the fire being the proximate cause of the loss; but as the policy specifically excludes explosion, the doctrine of proximate cause does not apply, and the company's liability is confined to the fire loss only.

Where an explosion occurs during the progress of a fire in the same building and is caused by the fire, if the effect of the explosion is simply to further the fire or to increase the strength of the fire, it would seem that the policy is liable for the whole damage. In this case there has been no

[1] See infra, page 72.

[2] "The intention then is to exclude loss by explosion which, but for the exclusion, would or might have involved the insurers in liability" (*Hooley Hill* v. *Royal Insurance Co.*, supra).

interruption in the sequence of events; the continuity is not broken, for the explosion has not resulted in any fresh outbreak of fire, nor has it started a new train of events, and it is impossible to distinguish between the damage done by the fire and that done by the explosion. "If there be already a fire upon the premises so that the explosion is incidental to and is occasioned by that fire, and then lends itself to further the fire and so to increase the loss, the whole of the damage caused is within the insurance of the policy."—(Kelly, C.B., in *Stanley* v. *Western*, supra.) And Baron Martin in the same case stated that: "If the consequence of the explosion was to create a concussion that caused the existing fire to burn more strongly than before that would be a loss by fire within the policy, and not within the exception; but as to what was caused by the explosion, the defendants are not liable." This seems reasonable, and is consistent with the sense of the contract.

The question in dispute in the action, *Everett* v. *London Assurance Co.* (1865), known as the Erith explosion case, was whether the company was liable under a policy which declared that the company would make good "such loss or damage as might be occasioned by fire" for damage done elsewhere than in the premises in which the explosion occurred. The explosion took place on 1st October 1864 in the gunpowder magazines of Messrs Hall at Erith on the Thames, caused by some accident on board a barge moored alongside and loading gunpowder

at the time. The magazine was destroyed, and great damage done by the concussion to property in the neighbourhood and for some considerable distance round. Various claims for this damage were made against the companies, who repudiated liability, and only one was made the subject of litigation.

It will be noted that the policy in this case varied the usual expression "loss or damage by fire," and the argument for the insured was that the term "occasioned by fire" included "every injury occasioned by fire in any way and at any distance,"[1] and in support of their argument the pursuers made use of Professor Tyndall's then recently expressed theory that fire was a motion of the particles of the air when heated, deducing from this that explosion was a similar motion, but of intensely greater rapidity. The insured in this case sought to read into the term "loss by fire" a more strict and technical meaning than is ordinarily understood by "fire." The courts, however, refused the plea of the plaintiff, and returned judgment in favour of the company. The proximate cause of the loss—the *causa proxima*—was held to be concussion of the air, the fire being only the remote cause—the *causa remota*. Mr Justice Willes, in delivering his opinion, stated that: "We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was

[1] Bunyon's 'Law of Fire Insurance,' 5th Edition, page 82.

occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property insured." Mr Justice Byles pointed out in the course of his judgment that the words "loss or damage by fire" must be construed according to the ordinary rules —that is, the damage was to be either from the ignition of the articles consumed, or by the burning of part of the premises where the article is. In the one case there would be "loss," in the other "damage."[1] In delivering his opinion, Mr Justice Byles quoted Lord Bacon's maxim of the doctrine of proximate cause: "It were infinite for the law to consider the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The effect of this maxim in fire insurance is to make a company liable only for such losses as are *proximately* caused by fire, and not where fire is merely the cause of the event which brought about the loss.[2]

Prior to the Erith explosion case it would appear that the companies were in the habit of paying explosion claims *ex gratia*. The well-known "Lottie Sleigh" case,[3] *e.g.*, was raised not on any question of liability, but by a shareholder who sought to have the company restrained from making any payment in respect of claims for which it was

[1] See supra, page 27. [2] See also supra, page 31.
[3] See infra, page 337.

admitted no liability existed. The policies excluded explosion, but the company, following the recognised practice, decided to pay the claims—which were for small amounts, and chiefly for glass breakage by the concussion from the explosion—*ex gratia*. The damage following the Erith explosion, however, was a more serious matter, and the companies took advantage of the explosion condition, and, as has been stated, repudiated liability.

The decision in the *Stanley* v. *Western* case, to which reference has already been made, is recognised in this country as the authoritative opinion on the question of liability for explosion damage, and was quoted in the Hooley Hill action in support of the judgment arrived at in that case. The question before the courts in *Stanley* v. *Western* was whether a policy containing the usual explosion exception was liable for a loss caused by fire which was brought about by an explosion which arose out of a previous fire. The policy condition declared that the company would not "be responsible for *loss or damage by explosion* except for such loss or damage as shall arise from explosion by gas." The process carried on in the plaintiff's premises was the extraction of oil from shoddy. A leakage in the still used in the process allowed some vapour of an inflammable and explosive nature to escape. The vapour took fire, ignited some matting, and then exploded. In addition to the damage done by the concussion, considerable damage was caused by the fire which resulted from the explosion. The insured claimed

under the policy for the whole damage as being due to the original fire, or at all events as being the result of an explosion of gas. The company argued that the condition relieved it of all liability except for the loss caused by the first fire, and the courts sustained this plea. It was held that the exception applied, the damage being the result of the explosion which caused the fire, not of the original fire which caused the explosion.[1]

Following the *Stanley* v. *Western* decision, it would seem that if an explosion occurs and causes a fire, unless the policy condition excluding explosion is modified to meet such circumstances, the whole loss would be excluded, since the explosion and not the fire is the proximate cause of the loss, the fire being only the natural consequence of the explosion, and spreading from it without the intervention of any new cause. As, however, the condition may specifically state that the exclusion does not apply to a fire following an explosion,[2] the company would be liable for the fire damage, although the concussion damage from the explosion would be excluded. Thus, if an explosion causes

[1] This decision does not appear to have found favour in America, the courts there holding that where the fire and the explosion occur in the same premises, the loss is within the policy and not within the exception, the fire being the proximate cause of the loss; but if the explosion which was caused by a fire does damage elsewhere than in the premises in which it occurred, the exception applies, since the proximate cause of the loss would then be the explosion and not the fire.

[2] The standard policy adopted by the Tariff Companies specifically includes fire damage, whether caused by explosion or not.

an outbreak of fire in the building in which the explosion occurred and the fire spreads, in the way that fires sometimes spread, from one building to another, the condition, unless modified in the manner indicated, should operate to relieve the company of liability, seeing that the whole loss is directly the result of explosion. If, however, the fire is not the direct and natural sequence of the explosion, but is merely accidental to it, as, *e.g.*, if the concussion from the explosion scattered live coals from an ordinary fire grate and thus set the building on fire, in such a case the explosion is only the remote cause—the cause of the cause,—the proximate cause being the dislodgment of live coals from the grate, and the exception would not apply. This seems in accordance with the ruling in the Erith explosion case, but with cause and effect reversed.

It should be borne in mind that a policy of fire insurance is intended to provide against loss or damage by fire, but the term "loss or damage by fire" must be construed according to the ordinary rules. An explosion is not an outbreak of fire as is commonly understood by that term, or as was contemplated when the contract was made, and consequently it is quite proper to exclude explosion damage from the scope of a fire policy. Apart from this an explosion may result in a loss of much greater magnitude than a fire in the same premises could cause, and while the probable consequences of a fire can be estimated with a fair degree of accuracy, it is otherwise with an ex-

plosion. For this if for no other reason, and particularly where owing to the nature of the processes carried on an explosion may be regarded as a not unlikely event, it is essential that a loss occasioned by explosion should be excluded from the insurance. The rule is modified, however, in the case of explosion arising from illuminating gas—except in premises where the gas is manufactured or stored,—and explosion of domestic boilers, whether fire accompanies the explosion or not. It is customary when a gas or oil engine is used in the insured's premises to insert in the policy a warranty excluding loss or damage caused by explosion in the engine, and similarly if gunpowder is stored in the premises, as, *e.g.*, in an ironmonger's shop, a memorandum is attached to the policy relieving the company of liability in the event of the explosion of the gunpowder; but the full effect of these clauses is modified to the extent that should a fire ensue, the company will be liable for the loss due to the fire; and generally, the condition against explosion may be cancelled by an endorsement on the policy which would then include all explosion damage, whether fire accompanied the explosion or not.[1]

The second class of excepted perils—where there has been an actual outbreak of fire, but originating from a cause the companies wish to exclude from their contract—includes —

(*a*) Invasion, foreign enemy, and military and usurped power.

[1] See infra, chap. xvii.

(*b*) Riot and civil commotion, rebellion and insurrection.

(*c*) Earthquake, volcano, and subterranean fire.

The intention of the contract—and the intention of the parties is of cardinal importance in interpreting the contract—is to provide for loss occasioned by an outbreak of fire in the ordinary sense of the term and occurring under normal conditions —not loss through a fire caused by the events above-mentioned, which are purely of an exceptional nature.

The recent war brought into prominence the fire risk attending military operations, and, as is well known, in order to meet the losses incurred through the operations of war, the Government created a special department to deal with insurances against loss from aircraft and bombardment. It should be noted that the Government scheme included not only losses due to enemy act, but also those incurred through the measures taken to resist the enemy, emphasising that the condition in the ordinary fire policy applies to all losses by fire originating directly or indirectly from a state of war, whether the loss was due to a hostile act or otherwise. A modification of the rule is found in the householders' comprehensive policy, which includes losses arising from "riot or civil commotion or military or usurped power," except in Ireland.[1]

The term *usurped power* has been held (*Drinkwater* v. *London Assurance Co.* (1767)) not to in-

[1] See infra, chap. xvii.

clude the acts of a common mob, but applies to "invasions from abroad," or to "an internal rebellion when armies were employed to support it and the laws were dormant." The exception became one of more than mere academic interest within recent years, chiefly owing to the Irish Rebellion in Dublin during the Easter week of 1916. The damage done to property through the rising was caused by the revolutionists and by the Government forces also, and in a case that arose out of the Rebellion (*Curtiss & Sons* v. *Matthews* (1919)), the definition of the term "*usurped power*" came up for discussion. While the courts refrained from committing themselves to a precise definition of the term, they gave it as their opinion that what had happened in Dublin was more than riot. It was, in the opinion of Mr Justice Roche, "civil strife amounting to warfare waged between military and usurped powers and involving bombardment." While according to Lord Justice Bankes, usurped power is "something more than the action of an unorganised rabble."

"The phrase is ambiguous, and its meaning may vary according to the subject-matter to which it is applied. It clearly applies to an armed and organised rebellion, which has got to such a head as to be under authority and to assume the power of government by making laws and punishing their disobedience. The phrase, however, is probably not capable of being precisely defined; and it may, therefore, be of wider application. At the same time, there must be facts which justify the

application of the phrase. There must be something in the nature of warfare, something which is more in the nature of war or civil war than of riot or civil commotion; and the persons taking part must be guilty of high treason, and not merely of felony. Further, there must probably be some kind of organisation."[1]

It is not easy for the ordinary individual to differentiate between *riot* and *civil commotion*, and to say what constitutes the one and what the other, but as riot and civil commotion are usually bracketed together in a fire policy as "excepted perils," it is immaterial for practical purposes wherein lies the difference.[2] The distinction would seem to be one of degree according to the intention and purpose of a mob, and its *modus operandi*. Riot is something more restricted in its purpose than civil commotion, which is of the nature of an organised insurrection "for the purpose of general mischief" and directed against law and authority, but not amounting to usurped power. It is tumult, but organised tumult with a definite purpose in view. Lord Mansfield, in his direction to the jury in the action *Langdale* v. *Mason*—a

[1] Welford and Otter-Barry, 'The Law relating to Fire Insurance" (1921 Edition, page 67). As a fire policy may now be extended to include fires caused by riot and civil commotion, it is well to have a clear distinction between what is riot and civil commotion, and what amounts to usurped power, otherwise difficulties will arise.

[2] Except, perhaps, that in the case of a *riot* the Local Authority is liable under statute to pay compensation for the loss so caused. (See infra, page 69.)

case arising out of the Lord George Gordon Riots in 1780,—defined civil commotion as "an insurrection of the people for general purposes, although it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purpose of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants," which the jury did. The policy in this particular case made no reference to riot, but excluded civil commotion.

A *riot* may be the involuntary act of an angry mob—not necessarily of lawless or disaffected persons—assembled without any preconceived intention of creating a disturbance, although possibly prepared to do so if thwarted in their purpose, but incited to momentary violence either by opposition or through anger and disappointment or because of some grievance, real or imagined. Or if a number of persons were assembled together, and either from excitement or for some other reason got out of control to such an extent that any interference with them in the execution of their common purpose—whether of wanton mischief or malicious injury—would result in a disturbance of the peace of an alarming nature, that also might amount to a riot.[1] Riot has been defined as "a

[1] See, *e.g.*, the case *Freeman* v. *Receiver of Metropolitan Police* (1922), reported in the *Post Magazine*, 25th February 1922, where a peace celebration crowd stripped an unoccupied building of some of its woodwork to provide fuel for a bonfire. The Judge (Shearman), held that what had taken place constituted a riot in the legal sense of the term.

tumultuous disturbance of the peace by three persons or more assembled together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."

The distinction between what is riot and what is civil commotion is not of such material importance as to distinguish between what is a riot and what may be only malicious injury amounting to nothing more than incendiarism.[1] A band of, say, half a dozen persons may set out for the deliberate purpose of inflicting some injury as an act of revenge. That in itself would not constitute a riot, but if they were intercepted in their purpose, and instead of disbanding, resorted to violence and created a disturbance to the alarm of the public, then the occurrence might assume the aspect of a riot. An incendiary fire is not excluded from the scope of a fire policy, except in the case of Ireland, where the policy may contain a condition against incendiarism.

The elements necessary to constitute a riot were set out in the case of *Field* v. *Receiver of Metropolitan Police* (1907) as :—

[1] It is here that difficulties are most likely to arise. *E.g.*, were the cotton warehouse fires in Liverpool in October 1920 the act of incendiaries, or were they the result of a riot, or brought about by persons acting under instructions from an usurped power ?

1. Number of persons, three at least.
2. Common purpose.
3. Execution of common purpose.
4. An intent to help one another by force, if necessary, against any person who may oppose them in the execution of their common purpose.
5. Force or violence displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

The recent case, *Boggan* v. *Motor Union Insurance Co.* (1921), arose in connection with a claim under a motor-car policy for the loss of a motor-car which had been commandeered upon the public highway in Ireland by four armed men. The policy condition excluded "loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power," and the company, therefore, repudiated liability for the loss as being due to a state of riot or civil commotion, with the further defence that the insured had failed to discharge the onus of proving that the loss had not been occasioned thereby. The case was tried in the first instance before the Lord Chief Justice of Ireland in 1921, who found for the insured on the ground that there had been no riot or civil commotion. This decision was upheld in the High Court of Appeal for Ireland in 1922. In the opinion of that court the incident could not be regarded as riot any more than a

burglary or house-breaking committed with violence could be so regarded. On appeal the decision of both courts was reversed by the House of Lords (1923). The abstraction of the car, it was held, was not an ordinary theft. The car was commandeered solely for the purpose of assisting the revolution, and, further, all the five elements which go to constitute a riot as defined in *Field* v. *Receiver of Metropolitan Police* (1907) were present in this case. The loss of the car, therefore, was due to a state of riot and civil commotion, and the insurers had discharged the onus resting upon them of proving that the loss was excluded by the policy condition.[1]

Another Irish case—one which also related to a claim for loss of a motor-car under circumstances similar to those in the *Boggan* v. *Motor Union* case, and referred to in the course of the House of Lords judgment in that case—was that of *Cooper* v. *General Accident Fire and Life Insurance Corporation* (1922). The condition of the policy in that case excluded riot and civil commotion within the land limits of Ireland. The Judge before whom the action was tried in the first instance found for the insured on the ground that what had taken place was nothing more than armed robbery. The High Court of Appeal for Ireland reversed this, and the House of Lords affirmed the Court of Appeal's decision, holding that the car was commandeered for purposes of rebellion, and consequently the loss could be held to be due to riot and civil commotion. The policy, it will

[1] See supra, pages 43 and 47.

be noted, excluded riot and civil commotion *within the land limits of Ireland,* and so long, therefore, as it could be proved that there was a state of riot and civil commotion within the limits specified, and that the loss was in consequence thereof, it was not necessary to prove riot and civil commotion at the place where the incident occurred.

The Riot (Damages) Act of 1886 (49 & 50 Vict., c. 38) provides the machinery for recovering any loss sustained as the result of a riot. By the terms of the Act the local authority is made liable for the damage, but if any compensation is due to the sufferers by way of insurance, the amount payable by the local authority is reduced by the amount of such compensation. This, however, does not preclude an insurance company from taking action for recovery of the amount paid by it under its policy. The Act, however, applies only to loss or damage caused by a riot. There is no liability on the local authority (except in Ireland, where a County Council is liable under statute [1]) for ordinary malicious or incendiary fires. The 1886 Act, however, does not apply to Scotland, the position there being governed by an earlier Act of George IV. (3 Geo. IV., c. 33). This Act provides that any damage or injury done by "any unlawful, riotous, or tumultuous Assembly of Persons" shall be recovered from the Local Authority within whose jurisdiction the riot was committed. If the claim does not exceed £5, an action for recovery is to be brought before the Justices of the Peace, and if

[1] Grand Jury (Ireland) Act, 1836; Local Government (Ireland) Act, 1898.

over £5 before a Judge Ordinary. The statutory time for raising an action for recovery is within one calendar month after the damage, on pain of forfeiture of any claim to compensation.

In a recent case (*J. Glikstent & Son, Ltd.* v. *State Assurance Co.*) the company put up the defence that the fire was the result of a riot, consequently there was no liability under the policy, which contained the usual riot exception. The fire in this case broke out in August 1921, in a timber-yard belonging to Messrs J. Glikstent & Son, Limited, situate in the East End of London, resulting in a very heavy loss. The firm had advertised that some porters were needed, and in response to the advertisement a large number of unemployed put in an appearance. Apparently disappointed and angry that it was only a few men the firm wanted, the crowd created a disturbance, and about 1 P.M. a fire broke out in the timber-yard. The company contended that the fire was a riot fire, while the firm held that the fire could not be associated with the disturbance, which had been quelled some hours before the fire, and moreover, that it was due to an electric fault. The verdict was for the plaintiffs, the jury finding that the fire was not due to incendiarism, and that there had been no riot at the time the fire broke out.

It is not likely that any question will arise in this country in regard to fires resulting from the "convulsions of nature." The leading case on *earthquake fires* is that of *Tootal, Broadhurst, Lee, & Co., Ltd.* v. *London & Lancashire Fire Insurance*

Co. (1908), arising out of the Jamaica earthquake in 1907. The case was tried in England before Mr Justice Bigham and a special jury, and the question at issue was the liability of the company for the loss by fire occasioned by the earthquake, the special circumstances being that the plaintiffs' premises were not burned as a direct result of the earthquake, but by the fire which had broken out earlier in the day in a building some 500 yards away. The main question to be decided was whether the company's liability was to be determined by the proximate cause of the loss, or whether the negation of liability for fires originating from earthquake governed the case. It was argued on behalf of the company: (1) that the fire which destroyed their insured's premises, although originating in the adjoining property, spread by natural causes from the earthquake, and consequently the company was relieved of liability by the terms of their policy, which declared that loss or damage occasioned by or through or in consequence of earthquake was not covered, and (2) that as the policies contained also the fallen buildings clause, by which the insurance immediately ceased upon the building, or a substantial part of it, falling otherwise than through fire, the insurance had terminated, since the buildings had fallen before the fire reached them.

For the other side it was argued that the exception did not apply, as the fire in the adjoining property had broken out prior to the earthquake; but even if that were not the case, the proximate cause of the fire in Tootal, Broadhurst's premises

could not be the earthquake, in view of the fact that the fire broke out at 11 o'clock at night, while the earthquake occurred at 3.30 in the afternoon, and consequently, the fire could not be associated with the earthquake. On the question of the fall of the buildings it was contended that the building had not fallen before the fire, but as a result of the fire.

In the course of the hearing the Judge made some remarks on the doctrine of proximate cause. The proximate cause of the fire in Tootal, Broadhurst's premises was fire, but the issue was complicated by the negation of earthquake fires. "The rule of insurance law as to proximate cause may not apply where there is a special contract."[1] Earthquake itself, according to the learned Judge, could not proximately cause fire, but may set in operation other agencies which would be the proximate cause of a fire; and if the fire spread by natural causes without the intervention of any other cause, the whole sequence of events would fall within the negation. It was found to be so in this case, and judgment was given for the company.[2]

Other two cases that arose out of the earthquake were *Pawsey & Co.* v. *Scottish Union & National Insurance Co.* and *Kingston General Commissioners* v. *Sun Insurance Office.* Both were heard in the colonial courts, and were decided against the com-

[1] See also supra, page 54.

[2] A report of this and the other two cases arising out of the earthquake will be found in Welford and Otter-Barry's 'The Law relating to Fire Insurance' (1921 edition, Appendix iv.).

panies; but the decision in the former was appealed to the Privy Council, who, however, upheld the judgment in both cases. The question was one of fact, as to whether the fires were caused by the earthquake or had independent origin. The latter was found to be the fact, and it was held that as the fires in both cases were not associated with the earthquake, although they were raging at the time, the exception did not apply, as the damage could not be attributed to an earthquake.

The modern tendency is to adjust the practice of fire insurance to meet the requirements of the insuring public, so far as that is permissible, having regard to the peculiar nature of the contract. While, therefore, at one time certain contingencies were excluded as not coming within the intention and purpose of a fire policy, it is now possible to include these, or some of them, when the need arises; but whenever a variation of the ordinary terms of a fire policy is made, it is done by an endorsement on the policy or by means of a separate contract; *e.g.*, it is now a matter of ordinary practice to include explosion arising from such trade processes as in distilleries, bonded stores, and corn-mills, by a special clause on the policy; and similarly, it is possible to include loss or damage from riot and civil commotion, explosion, earthquake, volcanic eruption, and subterranean fires;[1] but it should be noted that when any modification is made in the condition relating to any "excepted peril," the fact must be specifically stated in the policy.

[1] See chap. xvii.

CHAPTER V.

THE CONDITIONS OF THE CONTRACT.

1. Misrepresentation, Misdescription, and Concealment.
2. Alterations and Removal.
3. Alienation of Interest.

The conditions of a contract of fire insurance are of two classes :—

(1) *Implied conditions*, and

(2) *Express conditions*.

The first are essential conditions from the nature of the contract, which postulates the existence of certain things and certain facts, viz. :—

(1) That the property described in the policy is actually in existence at the time the insurance is effected.

(2) That the description of the property given in the policy is correct, so that when a claim arises it will readily identify the property destroyed as that intended to be insured.

(3) That the insured has an insurable interest; and

(4) That good faith will be observed by the insured towards the company.

Obviously, when an insurance is effected, it is presumed that the property to which the insurance relates is actually in existence. If it is not, then naturally the contract cannot attach, for there would be no possible loss for which the insured could be indemnified. If the property described is not what was intended to be insured no claim can arise under the policy, which can apply only to the property described in it,[1] and in the absence of an insurable interest the contract is not a valid one, since in the event of a fire it could not operate, the insured not having suffered a loss.[2] These essential conditions go to the root of the contract, for if the things they assume are non-existent, there would then be nothing to which the principle of indemnity could attach; or if the insured fails in any of the duties which are implied by the rule of good faith,[3] fundamental in a fire insurance contract, he forfeits any right to the benefits of the insurance. If any one of these implied conditions is not complied with, the contract is void *ab initio*, and never was a binding contract.

The second class of conditions, as the name denotes, are set forth, or expressed, in the policy, and their observance by the insured is a condition precedent to the validity of the contract or the

[1] See supra, page 39. [2] See supra, page 26.
[3] See supra, page 18.

company's liability: that is to say, a breach of them will either absolve the company from liability altogether, or postpone liability until they are complied with. The express conditions which are usually found incorporated in a fire policy relate, although in varying phraseology, to the following:—

(1) Misdescription, misstatement, and concealment of material facts.
(2) Increase of risk and removal.
(3) Alienation of interest.
(4) Intimation of loss within specified time, and proof of loss.
(5) Fraudulent claims.
(6) Reinstatement.
(7) Right of entry by insurers.
(8) Subsisting insurances.
(9) Arbitration.
(10) Warranties.
(11) Forfeiture of Premium.

The inclusion of some of these conditions is obligatory on tariff companies by Fire Offices' Committee Rules. It is, of course, competent for a company to insert such other provisions—so long as they are not unreasonable or impracticable—as it considers necessary from the circumstances of the particular insurance, such as an average clause, a warranty, or a clause defining the company's liability, and these also become express conditions.

These conditions serve various purposes. They interpret the contract and define its limitations, so that the insured may not expect what it was

never intended to give. They are mandatory in nature so far as they direct the insured in certain duties which he must perform, not only when a loss arises, but throughout the whole time the insurance remains in force. They are protective, inasmuch as they safeguard the company against anything being done, or omitted to be done, to its prejudice. They are the result of the experience acquired by the companies in the course of their operations. They enunciate the law as it relates to a contract of fire insurance, and emphasise the salient features in the practice of fire insurance.

Condition 1 deals with—

(*a*) Material misdescription.
(*b*) Misrepresentation.
(*c*) Omission of material fact for estimating the risk, either at the time of effecting the insurance, or later.
(*d*) Misstatement in connection with the proposal.

In a contract of fire insurance, the company and the insured are not on an equal footing in the knowledge they each possess of all the facts and circumstances attending the subject-matter of the insurance.[1] "Insurance is a contract of speculation; the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into the belief that any circumstance does

[1] See supra, page 19.

not exist, and to induce him to estimate the risk as if it did not exist."—(Lord Mansfield: *Carter* v. *Boehm* (1766).) And it is upon this knowledge which the insured possesses—or is supposed to possess—that the company relies for a proper estimate of the risk. "Where a person intending to insure proposes a risk to an underwriter he is bound to describe clearly the nature of the burden of which he is desirous to be relieved, and which he proposes to transfer to the underwriter; and the underwriter is entitled from the assured to all information which will enable him to say whether he will accept the risk, and at what premium he will do so. In other words, it is the duty of the assured to take proper steps to insure that he and the underwriter are *ad idem*."—(Mr Justice Matthews: *Laing* v. *Union Marine Insurance Co.* (1895).) Obviously, therefore, if anything material of which the company should have been told is concealed from it, or is not disclosed, or if any false or wrong statement is made—whether wilfully or in ignorance, with intent to defraud the company or not,[1]—and the company in consequence is misled into an erroneous estimation of the risk, the company is prejudiced. This, in the absence of any express condition, might be sufficient to avoid the contract, since the insured would be guilty of a breach of the duty of good faith implied in the contract. The condition, however, besides serving to emphasise the legal position, gives the company, apart from any other consideration, the

[1] See infra, page 83.

option of repudiating the contract in the event of the condition being violated.

The condition is protective to the company, and lays upon the insured the duty of putting the company in possession of all information material to a proper appreciation of the burden "which he proposes to transfer to the underwriter." This duty applies particularly during the negotiations leading up to the completion of the contract, but the condition imposes a further duty upon the insured, in that if anything takes place after the insurance has commenced to increase the company's liability, the insured is required to intimate the fact to his insurers. The insured has a more intimate knowledge of all the facts and circumstances attending the subject-matter than the company can possibly possess, and as "it is absolutely necessary that . . . there should be the purest good faith between the parties, and the most accurate representation of all material circumstances" (Mr Justice Park: *Everett* v. *Desborough* (1829)), the insured is obliged to disclose to the company everything that materially affects the risk and the company's liability.

The insured may not with impunity commit any error in the description he gives to the company of the subject-matter of the insurance. He may not, *e.g.*, describe a timber building as being constructed of stone or brick; or a building that is occupied in part for purposes of manufacture as being wholly used for warehousing goods; or

a building as detached when it is adjoined by and within risk of some other building; or state that goods of a certain description are stored in the building, and omit to mention that goods of other descriptions and of a more hazardous nature are also stored. These are particulars with regard to the risk of a material nature, and an error made in respect of any one of them might mislead the company into forming a wrong impression of the risk. (The insured would then be guilty of a breach of duty to the company,) for—whether purposely or unintentionally—he would have induced it into accepting a risk on terms less favourable to itself than would otherwise have been the case had a proper description of the risk been given. The misdescription may lie in the situation or locality of the building. The situation is stated in the policy, and becomes a part of the description of the subject-matter,[1] so that any inaccuracy in describing the situation of the risk might avoid the policy, as would any inaccuracy made in describing its situation in relation to other buildings, and likewise any inaccuracy in the description given in the policy of any other matter connected with the risk, as, *e.g.*, the occupancy of the building, the number of storeys, the method of heating and lighting, the number of hands employed, and so on. The description contained in the policy, both as to the risk itself and its locality, becomes incorporated in the policy and forms part of it, and in the majority of cases is made by the company

[1] See supra, page 40.

founded upon the information which the insured himself has supplied. It is a cardinal principle of the contract that the description of the "property insured"—*i.e.*, the particular physical object which forms the subject-matter of the insurance—should be sufficiently adequate to make it readily identifiable, when a claim arises, with the physical object in connection with which the claim is made.[1] Or, to state it in another way, the subject-matter of the insurance—*i.e.*, the "property insured"—should be readily identified, from the description of it given in the policy, with the subject-matter of the contract—*i.e.*, the loss—to indemnify the insured for which the contract exists. Any misdescription of the property insured in any material particular will render the policy void.

(Nor may the insured omit to acquaint the company of all matters affecting the risk and likely to influence its judgment.) It has been held, *e.g.* (*Bufe* v. *Turner* (1815)), that failure to disclose the fact that a fire had occurred in an adjoining property, although extinguished at the time the proposal was actually made, was a concealment of a material fact and a breach of good faith; and generally, if there is any circumstance—whatever the nature of the circumstance may be—in connection with the risk or the proposal which makes the danger of a fire breaking out greater than would ordinarily be expected from the nature of the risk, or which tends to increase the company's liability beyond what would be the case under

[1] See supra, page 40.

ordinary circumstances,[1] or which would influence the company's judgment of the risk,[2] and which, if the company had been told of it, would have influenced its decision whether to accept the proposal, and if so, at what premium,—the insured is guilty of concealment [3] of a material fact and a breach of duty to the company if he fails to disclose that such circumstance exists. (A material fact is one "which, if communicated, would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or another."—(Lord Justice Brett: *Rivaz* v. *Gerussi* (1880).)[4]

[1] As, *e.g.*, the precarious nature of his tenure (*Anderson* v. *Commercial Union Assurance Company* (1885)).

[2] *E.g.*, that he was not a British subject (*Horne* v. *Poland* (1922)).

[3] "Non-disclosure" is the more appropriate term. "Concealment" conveys the impression that the insured is deliberately withholding something from the company in order to make a better bargain for himself. That, of course, would be fraud, and the policy would be avoided; but an innocent concealment is sufficient to avoid the policy if the fact concealed is material.

[4] The duty to disclose is laid upon the insured in the case of marine business by the terms of the Marine Insurance Act. Section 18 of the Act (Marine Insurance Act, 1906) reads as follows:—

"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

"(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

It does not alter the case that the insured is innocent of fraudulent design in not disclosing. The fact remains that the company is prejudiced by his omission, and was induced into accepting a risk it would otherwise have refused, or accepted only at a higher rate of premium. "It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intent, vitiates the policy."—(Mr Justice Blackburn: *Ionides* v. *Pender* (1874).) "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."—(Lord Mansfield: *Carter* v. *Boehm* (1766).)

(The insured is not obliged to disclose only such facts as are within his actual knowledge, or only such facts as he himself considers material. If they *are* material, and are facts which he ought to have known, or should have made it his business to know, and which it was reasonable to assume he would know, he is none the less guilty of a breach of duty to his insurers if he fails to disclose them.) Nor will ignorance of what constitutes a material fact exonerate the insured from a charge of concealment. "Not only is he required to state all matters within his knowledge which he believes to be material, but all which in point of fact are so. If he conceals anything which he knows to

be material, it is a fraud; but, besides, it is said that if he conceals anything which may influence the rate of premium which the insurers may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."[1] Bunyon also states that "the question whether any fact should be communicated depends upon whether it is in point of fact material, not upon the opinion of the proposer whether it is so."[2]

There are, however, certain facts which, although material, need not be disclosed, and their non-disclosure does not constitute a breach of the duty of good faith by the insured. Generally speaking, the facts in question relate to matters which are obviously known to the company, or which it ought to have known, and it is reasonable to presume did know, or about which it ought to have made further inquiries. A fact which otherwise would be material becomes under such circumstances non-material. "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of."—(Lord Mansfield: *Carter* v. *Boehm* (1766)). Facts which are common knowledge need not be told to the

[1] Bunyon's 'Law of Fire Insurance,' 5th edition, page 136, quoting the Judge's words in *Dalglish* v. *Jarvie* (1850).

[2] Bunyon's 'Law of Fire Insurance,' 5th edition, page 137.

company, who, it is reasonable to assume, knows of them. If, again, an insured discharges the duty required of him by furnishing the company with complete information, he cannot be accused of concealment if he does not specifically state facts which the company ought to have inferred from the information supplied to it, or which it could have ascertained by making further inquiries. Thus, if an insured replies in the affirmative to a question as to whether he had been previously insured, it may not amount to concealment if he does not mention also that his previous company had declined to renew the insurance, although in the absence of any question he would be obliged to disclose the fact that a previous company had declined to renew his policy, since that would be a material fact. This usually is one of the questions on the proposal form, and a false answer to any question is, of course, fatal to the contract whether the question relates to something material or not. Further, the company may be said to have waived the disclosure of some fact where the information it has already received raises a doubt in its mind, or should have caused it to make further inquiries, but it omits to do so. Thus, if the process carried on is such as to require the use of inflammable substances, it is not concealment if the insured does not mention where these substances are kept. The company could have found out these particulars by asking the necessary questions. Nor need the company be told of "what lessens the risk agreed and

understood to be run by the express terms of the policy."[1]

(Representations are the statements made by the insured at the time of effecting the insurance. They may take the form of answers to questions on a proposal form, or the questions may be verbal, or they may be voluntary statements on the part of the insured, made with a view to inducing the company to accept his proposal. But whatever form they take, the representations must not be knowingly misleading or inaccurate. The statement may relate to some matter affecting the risk, as, *e.g.*, the trade carried on in a building, the number of assistants employed, or whether there is any stove on the premises, &c.; or it may refer to some circumstances affecting the company's liability, as, *e.g.*, whether the insured has been previously insured, and whether he has had previous losses.) The former are analogous to a description of the property, and are usually inserted in the policy as such, or they may appear in the

[1] By the provisions of the Marine Insurance Act certain things need not be disclosed, viz. :—

Sect. 18 (3) In the absence of inquiry, the following circumstances need not be disclosed, namely :—

(*a*) Any circumstance which diminishes the risk ;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know ;

(*c*) Any circumstance as to which information is waived by the insurer ;

(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

form of warranties,[1] and their accuracy is essential to the validity of the policy, for a warranty must be *literally* complied with. Other representations which do not relate to the property are not expressed in the policy as part of the contract. They are representations only, and it is sufficient if they are *substantially* complied with, unless they are expressed in a formal proposal which is incorporated into the policy and forms the basis of the contract. In that case they are of the nature of warranties and must be literally true. It has been held that the truth of a representation is not a condition precedent to the liability of the company unless the insured knows the statement to be untrue, when there would be fraud; but in the absence of fraud, a misrepresentation or misstatement, provided it is a *bona-fide* statement of fact so far as the insured's knowledge goes, does not vitiate the policy. "There is nothing in law to make the truth of the statement a condition precedent to the liability of the defendants upon the policy; unless it is untrue to the knowledge of the plaintiffs, and therefore fraudulent, the untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect."—(Mr Justice Willes: *Wheelton* v. *Hardisty* (1858).) "If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract;

[1] The policy, *e.g.*, may contain a warranty against the storage of mineral oil, or against more than a specified number of hands being employed. See also supra, page 161.

and even if material, but there is no fraud in it and it forms no part of the contract, it cannot vitiate the right of the party to recover."—(Lord Cranworth: *Anderson* v. *Fitzgerald* (1853).)

In the absence of an express condition in the policy requiring these statements to be true, it would appear, therefore, that the effect of an inaccuracy on the validity of the policy would depend upon whether the insured purposely misrepresented the facts, and so induced the company to make a contract unfavourable to itself. As, however, the condition requires all representations made by the insured, whether in answer to questions in a proposal form or in any other way, to be accurate, any inaccuracy makes the policy voidable at the option of the insurers; and rightly so, for a misrepresentation, even when no fraud can be imputed, and there is no question of a breach of the duty of good faith, if it relates to a material fact, may prejudice the company who, if the statement had been true, might have formed a different opinion of the risk; but apart from this the condition gives the company the option to avoid the policy in the event of misrepresentation of any material particular.[1]

[1] The provisions of the Marine Insurance Act relating to representations are :—

Sect. 20 (1). "Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract.

"(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

It is not always easy to distinguish between non-disclosure (or concealment) and misrepresentation; sometimes they are indistinguishable. The one relates to such facts as have a direct bearing on the risk, and which would influence the insurer's estimate of the hazard inherent in it; the other denotes some statement which the insured has made either voluntarily or in answer to specific questions, and not necessarily concerned with anything inherent in the risk, but which, nevertheless, exercises an influence on the company in deciding whether to accept the risk or refuse it. Thus, if the insured failed to inform the company of some external hazard by which the risk was menaced, that would be concealment; but if he falsely led the company into believing that other insurers of skill and judgment were willing to accept his risk at ordinary rates, and thus induced the company into accepting his risk, that would be misrepresentation; or if the insured represented that he had previous losses but understated the number, his error would either be a fraudulent representation amounting to concealment, or an innocent misrepresentation, according to whether he purposely or unintentionally understated the number of his previous losses.

Condition 2 relates to—

(1) Alteration in the risk.

(2) Removal.

A contract of fire insurance relates to some physical object which must be identified with the description of it given in the policy. The descrip-

tion, moreover, serves to define the risk. If the insurance is for a building, or for the contents of a building, the policy will state how the building is occupied and where it is situated, and in many cases narrate some of the circumstances attending it, such as the height of the building, the method of heating and lighting, the number and class of machines used in it, the nature of the goods contained in it, and how it is located in relation to other buildings. All this serves to define the risk and identify the property insured. The question then arises as to how far the validity of the policy is affected by an alteration made on the risk, or in the circumstances attending it, or in its situation. In the absence of any express condition, an alteration, whether it increases the risk of fire or not, does not seem to invalidate the contract, so long as the identity of the subject matter remains and the alteration is not a breach of good faith, where, *e.g.*, the insured at the time of effecting the insurance had not concealed his intention to make the alteration. But if the alteration is such as to make the subject matter no longer capable of being identified with the description in the policy, the contract ceases to exist. In the case, *Pim* v. *Reid* (1843), the premises were insured as occupied by a paper-maker, but were let after the policy had been effected to another tenant, who occupied them for the purpose of treating cotton-waste—a more hazardous process than that of paper-making. The company sought to repudiate liability on the ground that as the risk had been increased the

policy was void, but the court disallowed this. There was no condition in the policy providing for an increase in risk, and such conditions as were in the policy related only to the circumstances as they existed when the policy was taken out. "I am of opinion that on general principles a policy of insurance is not avoided by an alteration in the trade carried on upon the premises."—(Tindal, C.J.) On the other hand, Lord Campbell (whose opinion, however, does not seem to have been affirmed in other cases), in the case *Sillem* v. *Thornton* (1854), said: "The construction and use of the premises insured, as described in the policy, constitute the basis of the insurance and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer." And in the case *Thompson* v. *Hopper* (1858), Mr Justice Willes stated: "In effect, there being no violation of the law and no fraud on the part of the assured, an increase of risk to the subject matter of insurance, its identity remaining, though such increased risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance," and in referring to Lord Campbell's opinion, said: "If it was intended to negative the proposition just stated, we ought to overrule it."

If an insured were allowed without penalty to increase the fire risk of his premises—so long as

no fraud could be imputed and the identity of the risk remained—the companies might find themselves incurring a liability in excess of what existed at the time the contract was made and what was understood. The company accepts liability for the risk as it is represented to it and as it is described in the policy, and adjusts the premium accordingly; and to obviate any possibility of its liability being increased unknown to it the policy contains a condition which declares the contract to be avoided if, after the insurance has commenced, the risk is increased "from any cause whatsoever," unless the consent or sanction of the company is signified to such alteration by an endorsement on the policy.

The condition is not of uniform construction in all fire policies, but generally it relates to such alterations as increase the risk. Any other alteration which does not have that effect is not prohibited, so long as the identity of the property is not destroyed. If the increase made on the risk necessitates an additional rate being charged, the insured would require to pay the increased rate, for the company's consent to the alteration in such a case would be contingent upon an increased rate being paid. The alteration may relate to a *structural* alteration, or to an alteration in the *purposes* for which the building is used, whether it be the person occupying it, or the processes carried on in it, or the nature of the goods contained in it. A change in any one of these directions may increase the fire risk and avoid the contract if the company's sanction to the change is not obtained.

Where the contemplated alteration is important and likely to affect the fire risk, in most cases the company will be informed of it beforehand. This is a wise precaution, for whether the company's consent to an alteration must be obtained before or after the alteration is made is a moot point and depending upon the particular terms of the condition.

In actual practice a breach of the condition is frequently waived, as in the case of a building in multiple tenures. Every change that takes place in the tenancy of the building may not be intimated to the company, who, notwithstanding this omission, does not in every case repudiate liability, although the condition gives it the right to do so should circumstances warrant such a course. A modification of the condition is made also where the insured has no control over the uses to which the building is put, or any means of knowing what changes may be made in these, or what alterations may be done to the building. A mortgagee, *e.g.*, who insures his interest as such, cannot be expected to know when the proprietor or the tenant of the building over which his bond is secured has done anything to increase the risk. Sometimes a special clause [1] is inserted in the policy modifying the requirements of the condition in such cases, with the reservation, however, that should it come to the knowledge of the insured that anything has been done to increase the risk, he will notify the fact to the company and pay such increase of premium

[1] See Appendix.

as may be required. Failure then to perform that duty would vitiate the contract against him. This modification is a modification in practice only, for legally, the insured would be guilty of a breach of the condition, whether the alteration were made without his knowledge and consent or not.

The same rules apply to that part of the condition which relates to removal of the property. The situation of the building as stated in the policy is held to be an integral part of the description of the subject matter,[1] and consequently, if the property is removed to another place, the description given in the policy is no longer applicable, and the contract becomes void; but apart from any consideration of this nature, the condition is important from the point of view of the company, whose liability might be seriously affected by a change in the locality of the risk. Unless, therefore, it is expressly provided otherwise,[2] a fire policy does not automatically follow the property to wherever it may happen to be removed. The contract ceases if the property is removed from the place specified in the policy, unless the company is informed of the removal and its consent obtained.

The question of the effect on the validity of the contract of an alteration made on the risk after the policy is issued is not without difficulty, and has given rise to many disputes between the companies and their insured. It is not always an easy matter to determine whether some particular altera-

[1] See supra, pages 40 and 80. [2] See infra, page 374.

tion is prohibited by the condition or not: it is a question of construction. The purpose of the condition, of course, is protective, for once the company has accepted liability according to the circumstances of the risk as existing at the time that the contract was made, it should be afforded some protection against any increase in that liability by subsequent acts done by the insured unknown to it. The intention, therefore, is to prohibit anything being done which, after the contract is made, would increase the company's liability, by declaring the policy void if such increase takes place without its knowledge and consent. This is only equitable and consistent with the fundamental principle of good faith implied in a contract of fire insurance.

Although the contract is an entire contract and liable to be avoided as a whole through a breach of any condition, this is modified to the extent that if the policy contains more than one item, the contract is avoided only as regards the items affected by the breach, the company's liability under the other items of the policy remaining unaffected.

Condition 3 refers to *transfer* or *alienation* of interest, and emphasises the personal nature of a fire policy. It provides that in the event of the insured's interest in the property passing to any other person, the insurance terminates, unless the company consents to transfer the policy to the new interest.

The purpose of a contract of fire insurance being to indemnify the insured against loss, it follows that if the insured has parted with his interest in

the subject matter, he can suffer no loss through its damage or destruction by fire, and consequently, the insurance terminates when the insured's interest in the subject matter of the insurance ceases, since there is no further need for it. "The fact that the insured had parted with all interest in the property insured would be an answer to the claim on the principle that the contract is one of indemnity only."—(Lord Justice Cotton: *Rayner* v. *Preston* (1881).) If, therefore, the insured becomes divested of his interest in the property insured, the contract, in the absence of an insurable interest, is no longer a valid one.

It is a precept in law and practice that a fire policy cannot be assigned without the company's consent. "These policies are not in the nature of them assignable, nor intended to be assigned, from one person to another without the consent of the office."—(*Lynch* v. *Dalzell* (1729).) The insured may assign the property, but he cannot assign the policy, for a fire policy is not a contract that goes with the property as one of its purtenants, but is a collateral contract relating to a personal loss which would fall on the insured in connection with the property. A fire policy does not ensure that a fire will not damage or destroy the property, for that is impossible. What it does is to insure the insured against the personal loss he would sustain through its damage or destruction by fire. "To whom and for what loss are they (the insurers) to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it

cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage."—(Lord Hardwicke: *Saddlers' Co.* v. *Badcock* (1743).)

The assignation of the property, therefore, does not in itself vest the assignee in any title to the policy, or in the event of a loss give him the right to enforce it, either in his own name or in the name of the original insured, for his own benefit. The assignee, not being the person with whom the company made the contract, cannot participate in any of the benefits arising out of the policy, unless the company consents to transfer the policy to his interest. In the absence of any such transfer of interest by the company, the new owner has no claim under the original policy.

The condition refers essentially to a complete change of ownership, where the insured is divested of all interest in the property. It does not include such a change in interest as would arise were the insured to mortgage the property, for although the character of his interest is changed—*i.e.*, from a proprietary one to an equitable one,—he would still retain his interest as mortgagor. The condition, therefore, does not deprive the insured of his right to the benefits of the policy because he transfers the property to a mortgagee (or bond-holder) in security for the loan which he has received. There has been no alienation of interest. The insured is still in possession of the property, and may at any time redeem his legal title, for

there has been no absolute conveyance of the property.[1]

Nor does a sale covenant affect the validity of the contract under the condition, so long as the purchase price remains unpaid. Although the risk passes to the purchaser whenever the sale contract is made, the insured does not become divested of his legal ownership until the property has been conveyed to the purchaser by an absolute conveyance. Till then the insured retains an insurable interest entitling him to recover under the policy in the event of a loss, for if a fire occurs before the sale contract is completed, he may stand to lose, for the purchaser may become insolvent or for some other reason fail to complete the contract. If, however, he has been indemnified by his insurers as an unpaid seller under a covenant of sale, he must subrogate his insurers in his rights against the purchaser for the purchase price.[2] When, however, the purchase price has been paid and the sale contract is complete, interest in the property passes absolutely to the purchaser and the policy ceases, unless it has been transferred by the company to the new owner. In the absence of any such transfer, the purchaser cannot enforce the seller's policy for his own benefit. Nor is he entitled, without the company's consent[3] to the protection of the seller's policy during the interregnum

[1] See also infra, page 198.

[2] See infra, chap. ix.

[3] Which is usually signified by an endorsement on the policy covering the purchaser's interest as such.

between the time the sale contract was made and the time of its completion by the payment of the purchase price, although during that period he has a joint interest in the property with the seller.[1] In the case *Rayner* v. *Preston* (1881), a purchaser who had contracted for the purchase of a house, but had omitted to protect his interest as purchaser, sought to enforce a claim on the proceeds of the seller's policy, the house having been burned down before the date fixed for the completion of the contract. But the courts gave judgment against him, holding that he was not entitled to the benefits of the seller's policy. "The contract (*i.e.*, the sale contract) passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts ; and such, in my opinion . . . the policy of insurance is . . . The contract of insurance is not of such a nature as to pass without apt words under a contract of sale of the thing insured."—(Lord Justice Cotton.) And Mr Justice Quain, whose judgment was quoted by Lord Justice Brett in the case of *Rayner* v. *Preston*, stated in the case *North of England Pure Oil Cake Co.* v. *Archangel Maritime Insurance Co.* (1875), that "on the sale of a thing insured, no interest in the policy passes to the vendee, unless, at the time of the sale, the policy be assigned either expressly or impliedly." As soon as the property in a thing which forms the subject of a sale contract passes by law to the

[1] See also infra, page 186.

buyer, the seller's interest in it ceases and the policy ceases also. The seller has no longer any insurable interest, and the buyer has no claim to the benefits of the seller's policy, unless it has been endorsed to his interest.[1]

There may appear something arbitrary in a rule which prevents a purchaser from benefiting under the seller's policy in the event of the property being destroyed by fire before the sale contract is completed, especially when it is considered that if the seller receives a full indemnity from his insurers, he is required to repay it on payment of the purchase price.[2] This in effect means that the policy benefits nobody; it is for all intents and purposes non-operative. Why, it might be asked, should it not be made available for the purchaser, especially where the company, had it been asked to do so, would have endorsed the policy to include the purchaser's interest? It should be borne in mind, however, that the person with whom the company contracted to indemnify for loss is the seller and no one else; and while the manner in which the seller disposes of his property does not concern the company, the character of its insured concerns it very intimately, for the personal element—or what is called the moral hazard[3]—is as important in a contract of fire insurance as the physical hazard, if, indeed, it is not more so. The company must be given an opportunity, therefore, of considering the contract from the point of view

[1] See also infra, chap. x.

[2] See infra, chap. ix.

[3] See infra, chap. xiii.

of the moral hazard. This is the purpose the condition is intended to serve, as if the assignment of the property insured assigned also the benefits as well as the responsibilities of the policy, a company might by the sale or transfer of the property incur a liability in excess of what was contemplated by the original contract. Hence it is that a fire policy cannot be assigned without the company's consent.

It might be asked whether the provisions of the Metropolitan Building Act of 1774 do not afford some protection to an uninsured purchaser in the event of a fire happening before conveyance of the property to him. Section 83 of the Act requires an insurance company to lay out the insurance money in reinstating if requested to do so by any person "interested in or entitled unto any house or houses or other buildings." The point was raised in *Rayner* v. *Preston*, and also in the *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1902) case, where the pursuer asked for a mandamus to compel the company to reinstate, but this was refused. The Act, notwithstanding its title,[1] seems to be of more than local application. It has been held (Lord Chancellor Westbury) to apply to England, but apparently its scope does not include Scotland and Ireland. The Act, however, relates only to buildings and such fittings as go with the heritage; it does not refer to moveables.[2] The Act, it will be

[1] Fires Prevention (Metropolis) Act, 1774 (14 Geo. III., chap. 78).

[2] See infra, page 119.

observed, gives the right to any person "interested in or entitled unto" the property to request the company to reinstate. It does not seem to be clear whether this would include a purchaser under a sale contract,[1] although such a person has an equitable interest in the property. If it did, then a purchaser who had omitted to cover his interest by insurance, might stop the company paying the insurance money to the seller, and ask that it should be expended in reinstating the building.

The following clause is sometimes attached to a fire policy (or it may be incorporated as one of the conditions) :—

"If at the time of loss or damage to any building hereby insured the insured shall have contracted to sell his interest in such building and the purchase shall not have been but shall be thereafter completed the purchaser on the completion of the purchase if and so far as he is not otherwise insured against such loss or damage shall be entitled to the benefit of this policy so far as it relates to such loss or damage without prejudice to the rights and liabilities of the insured or the company under the policy in the meantime."

The effect of the clause is that although the seller, who is the insured under the policy, is paid the amount of his loss, the purchaser, if he has no insurance of his own, participates in the benefits of

[1] In *Rayner* v. *Preston*, Lord Justice James considered it did, whereas Lord Justice Cotton refrained from expressing an opinion.

the policy in so far that he can bring the amount which the seller has recovered under his policy into account when settling with the seller. The clause, which relates to buildings only, does not entitle the purchaser to any claim on the proceeds of the policy at the time of the loss, but only entitles him to deduct from the purchase price the amount of the loss paid to the seller.[1]

The validity of the policy apparently is not affected in the case of an unpaid seller of heritable property who has conveyed the property to the buyer, and has thus parted with his legal ownership. He still possesses an equitable interest in the property in respect of his lien for the purchase price. This gives him an insurable interest, and in the event of a loss he may recover under his policy; but if he parts with his lien his insurable interest disappears, for he is then in the position of an ordinary creditor for the purchase price. Where the sale contract relates to moveables, if the purchase price has been paid before conveyance, and the seller has contracted liability to the purchaser for the safety of the property, the seller still possesses an insurable interest in the property in

[1] A seller and purchaser of real property can, of course, mutually agree as to how the policy money is to be applied in the event of the property being destroyed before the sale contract is completed, but any agreement of this nature cannot bind the company, whose contract still remains with the insured named in the policy. The Law of Property Act, 1922—which comes into force in 1925,—will, however, render such an agreement unnecessary in the future, since provision is made in the Act that any money payable to a seller under his fire policy, after a sale contract has been made, will be held by the seller on behalf of the purchaser.

respect of such liability; but in that case his insurable interest might be only that of a bailee, and the condition of the policy excluding goods held in trust or on commission, unless specially insured, may operate to deprive the insured of any right of recovering under the policy in the event of a loss.[1]

It will be noted, however, that an exception to the rule is made where the interest in the subject-matter passes by will or by the operation of law—*i.e.*, where trustees, administrators, or executors are appointed under a will, and also judicial factors, executors dative, and trustees in bankruptcy appointed by the courts. These hold the property and administer it on behalf of the legal owner. As a rule, the nature of their interest is shown in the policy; but if this were omitted, the omission would not invalidate the insurance. The law regards these persons as having a legal interest in the property, so much so that they are accountable to the courts for the proper administration of the trust. Those who are appointed by the courts, such as factors, curators, and executors dative, are as a matter of fact under the supervision of the courts.

A fire policy, after having been transferred,

[1] Condition (2) of the standard policy adopted by the tariff companies applies to a complete cessor of interest, so that although the legal ownership in the property may pass from the insured, if he still retains an interest in it, of whatever nature, the policy is not avoided, although by the condition relating to goods in trust referred to, the insured may still be precluded from recovering.

either with the company's consent, or by will or the operation of law, may still be liable to become void through some act or omission on the part of the original insured. If the contract has become vitiated in any way against the original insured, it would be vitiated against the new interest also.

CHAPTER VI.

THE CONDITIONS OF THE CONTRACT (*continued*).

4. Intimation of Loss.
5. Fraudulent Claims.
6. Reinstatement.
7. Right of Entry.

Condition 4 narrates the procedure to be followed and the duties to be performed by the insured on the happening of a loss, and the fulfilment of these duties is a condition precedent to liability. The condition makes the following stipulations :—

(*a*) That notice of the loss must be made forthwith in writing to the company.

(*b*) That a statement of claim and particulars of value must be delivered within a prescribed period—thirty days or whatever other time is specified.

(*c*) That the insured must furnish such data as are necessary to support his claim, and, if required, make a statutory declaration in verification of these.

(*d*) That if the policy is an average one, particulars of value relating to the whole property covered by the policy—or the item affected—must be furnished.

(*e*) That details of any other insurances over the property are to be furnished.

Notice in writing is not always insisted upon. A verbal intimation may be accepted, and it may be sufficient if notice of the loss is made by an agent or some one acting for the insured, and to an accredited agent of the company. But in whatever manner and by whomsoever the notice is given, it must be done *forthwith*. This is essential in order that the company may be given an opportunity of investigating the circumstances of the loss. It would scarcely be reasonable to intimate, say three months after the event, that the loss had happened. By that time all traces of the fire may have disappeared, and the company would have no opportunity of investigating the facts for itself. Notice, therefore, must be given forthwith—*i.e.*, within a reasonable time after loss,—so that the company may not be prejudiced by any unnecessary delay. Delay in giving notice might amount to a breach of the condition, and if the company did not repudiate liability altogether, any payment it might make would be of an *ex gratia* nature.[1]

The condition further provides that within a specified time the insured must deliver a statement in writing giving particulars of the loss, the property affected, and the value. To facilitate

[1] See infra, chap. xiii.

this, and as a matter of convenience, it is the practice of the company to issue its own form of claim, which sets forth the various details required —*e.g.*, the name of the claimant, and in what capacity he claims—*i.e.*, as owner, mortgagee, &c.; the time, date, and cause of the fire; where it originated; whether any other person has an interest in the property affected; and whether there are any other insurances in force covering the same property. The claim form also provides for details of the property claimed for being furnished, with the value of these at the time of the fire; the value of the salvage, if any; and the actual amount claimed. Moreover, by the terms of the condition, it is necessary where the policy is an average one that particulars of the value of the whole property embraced by the insurance must be furnished, whether such property is affected by the fire or not. This is required, seeing that under an average policy the company's liability is in the proportion which the sum insured bears to the total value of the property covered.[1]

There is nothing arbitrary in all this, nor anything that can reasonably be taken exception to. Lord Campbell, in *Roper* v. *Lendon* (1859), characterised such a condition as "a very reasonable one, it being obviously of great importance to the defendant's company to know, as soon as possible after a loss, the amount claimed by the assured."

By the provisions of the condition, the company may, if the circumstances of the particular loss

[1] See infra, chap. xii.

call for such procedure, require the insured to make a statutory declaration[1] in verification of his statements concerning the loss, but in practice this is seldom required. By the Statutory Declarations Act (5 & 6 William IV., chap. 62), a person making a false declaration is deemed guilty of a misdemeanour.

In some policies the condition specifically states that unless its terms are complied with no claim under the policy shall be payable.

Condition 5 declares that the insured will forfeit his right of benefit under the policy—

(*a*) If the claim is in any respect fraudulent.

(*b*) If a false declaration is made in support of the claim.

(*c*) If the fire has been caused wilfully by the insured, or with his knowledge or connivance.

(*d*) If fraudulent devices are used by the insured or any one acting on his behalf to obtain the benefits of the policy.

Mr Justice Willes, in *Britton* v. *Royal Insurance Co.* (1866), says: "The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim. . . Such a condition is only in accordance with legal principle and sound policy."

The duty of good faith requires the insured to

[1] For form of Statutory Declaration, see Appendix.

observe the strictest integrity in dealing with the company in all matters relating to the contract, whether during the preliminary negotiations, or while the contract is running, or when a loss arises; and equally important is it, in its own interests and in those of the insuring public, for the company to make a full and searching examination into any claim which is the least suspicious. A claim may be fraudulent in respect of some false statement in connection with it, or false evidence in support of it, the insured knowing these to be false; or the whole circumstances attending the claim may be fraudulent, as when the insured seeks to obtain the benefits of the policy by unlawful means—*e.g.*, by wilfully setting fire to the property, and then claiming under the policy; or by attempting to recover in respect of property alleged to have been damaged, but which, as a matter of fact, had been removed and was not affected by the fire; or the claim may be fraudulent in respect that the insured has purposely, and with intent to defraud the company, overstated his actual loss. An over-valuation does not in itself make the claim fraudulent, since the value of what is lost or damaged may be a matter of opinion, or the insured may honestly believe—although he may be guilty of a mistake—that the value he put upon the property was a true value. It is when the value is purposely overstated that the claim is tainted with fraud and the insured is barred from recovering. If the insured "deliberately introduced into his claim one article which he never possessed, or

placed upon any one that he did possess a fraudulent and false value, he was not in point of law entitled to recover."—(*Haigh* v. *De la Cour* (1812).)

Condition 6 gives the company the option to *reinstate* the property damaged or destroyed, if it chooses to do so.

The obligation laid upon the company by the contract is to pay a sum of money equivalent to the value of what has been lost, and in the absence of any express condition providing otherwise, the company could not compel the insured against his wishes to accept reinstatement or replacement as indemnification of his loss, nor, speaking generally, could the insured insist on reinstatement. Circumstances may arise, however, when it would be more advantageous to the company to reinstate than to make a money payment, and it is to provide for this that the condition is incorporated in the policy as an express condition, in order that the company may have the option to reinstate if it considers that the better course. The option belongs to the company only.[1] Notwithstanding the condition, the contract remains one to make a money payment until the company of its own election substitutes reinstatement as the mode of discharging its liability instead of paying a sum of money. If, however, the company elects to exercise its option to reinstate, it must abide by its decision. It may not act in a capricious manner and change its mind should it discover that rein-

[1] See, however, infra, page 117, as to when the company may be required by statute to reinstate if called upon to do so.

statement will cost more than if the claim had been settled in the ordinary way. "The defendants are bound by their election, and if the performance has become impossible, or . . . more expensive than they had contemplated, still they must either perform their contract or pay damages for not performing it."—(Mr Justice Crompton: *Brown* v. *Royal Insurance Co.* (1859).) When the company decides upon reinstatement, the contract is no longer one to *pay*, but to *reinstate*. "The case stands as if the policy had been simply to reinstate the premises in case of fire; because, where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do."—(Lord Campbell in *Brown* v. *Royal*, supra.)[1]

Reinstatement takes the form of rebuilding in the case of buildings, and replacing where it is goods that are destroyed, or are so damaged as to be incapable of repair. "The words 'reinstate' and 'replace' should be thus applied; if the property is wholly destroyed the company may, if they choose, instead of paying the money replace the things by others which are equivalent to them; or, if the goods insured are damaged but not destroyed, may exercise the option to reinstate them—*i.e.*, to repair them, and put them in the condition in which they were before the fire."—

[1] And, on the other hand, if the company elects to indemnify the insured by a money payment, it is bound by its election, and cannot afterwards seek to substitute reinstatement for a payment of money.

(Lord Esher: *Anderson* v. *Commercial Union Assurance Co.* (1885).) If the property insured is damaged only and can be repaired, reinstatement will then take the form of repairing the damage done, and not infrequently companies choose this mode of meeting the loss, although there are certain objections to it; but whenever a company decides upon reinstatement or replacement, the duties it thus takes upon itself must be adequately performed. A building must be rebuilt substantially the same as it was before the fire; the goods replaced must be of the same description and quality as those destroyed; and if the damage is repaired, the repair must restore the property to its former condition.

But it may not always be possible to restore what has been damaged or lost precisely to the same state as before, especially where a building is concerned. Local Building Acts may not allow reconstruction on the same lines as hitherto; or improved sanitary arrangements may be required; or, for other reasons, it may not be possible to reproduce the original design. The company is thus faced with a difficulty, for if the new structure is of inferior value to the old building, the company will be liable in damages to the insured. On the other hand, if the company is involved in an expenditure greater than was contemplated, and greater than would have been the case had the loss been settled in the usual way, it has no redress, even although the sum expended upon reinstatement is in excess of the sum insured by

the policy, unless the condition provides otherwise.[1] If, again, the new building is superior to the old one, the company gets no consideration for the enhanced value of the new structure. Once the company has elected to reinstate, it cannot retract. If it "acted under a mistake when, instead of paying the sum insured, it elected to rebuild the premises," the company must carry through the obligation it has taken upon itself, or be liable to the insured in damages for its failure.

Moreover, the company is responsible for the workmanship of the new building. If that is bad, it will be liable to the insured for any expense he may incur in remedying the defect, and during rebuilding operations the company is in the position of a contractor, and liable for any damage by fire to the building during reinstatement. Further, in reinstating, the company cannot take the benefit of any average clause on the policy. As the company has elected to substitute reinstatement for a money payment, it is bound by its election, irrespective of the costs incurred in this. It cannot compel the insured to bear any part of

[1] The condition sometimes provides that: "The company in so replacing or reinstating shall be bound only to do so as nearly as circumstances permit and in a reasonably sufficient manner, and shall not in any case be bound to expend in respect of any one of the items insured more than the sum insured thereon." The reinstatement condition of the standard policy provides that: "The company shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonably sufficient manner, and shall not in any case be bound to expend in respect of any one of the items insured more than the sum insured thereon."

these costs, unless the condition provides that not more than the sum insured shall be expended on reinstating or restoring.[1]

Owing to the risks and uncertainties attending reinstatement, the companies resort to this mode of settling the loss only under very special circumstances. As an illustration of the danger attending an election to reinstate, Bunyon[2] cites a case where a building, which was in process of being reinstated, was condemned by the Commissioners of Sewers as dangerous, and was ordered to be removed. In an action against the company the court found for the insured, notwithstanding that reinstatement had been rendered impossible. This was the case of *Brown* v. *Royal* already referred to.

Where, however, different interests in the same property exist, as of landlord and tenant or different classes of bondholders, reinstatement may be the readiest way of settling the loss, since, as will be noticed later,[3] the doctrine of contribution does not apply where the insurances cover different interests in the same property. Consequently, if each company is liable to make a money payment to the extent of the respective interests of each of their insured, the aggregate payment by the companies involved may be in excess of the actual value of the property; or if the same company insures the different interests in the property by separate contracts, it could not pay to one of

[1] See supra, page 114.

[2] Bunyon's 'Law of Fire Insurance,' 7th edition, page 204.

[3] See chap. vii.

them and rely upon him applying the money in rebuilding. If he failed to do so, the company would have no redress, and be liable for the claims from the other interests, thus paying the same loss two or three times over, according to the number of interests affected. To avoid a contingency such as this, a company might elect to exercise its option and reinstate the damage.

It has been held (*Anderson* v. *Commercial Union Assurance Co.* (1885)) that where moveable property is affected, neither is the company deprived of its election to reinstate, nor can the insured demand payment in money instead of reinstatement, because it is found impossible to replace the property in the same place in which it was before the fire, owing to the building not being rebuilt or the insured losing possession of it. If the property cannot be reinstated in the original place, the insured can ask that it be restored in some other place within a reasonable distance of the premises in which it originally was.

The condition obliges the insured to perform certain duties towards the company, in respect that he must furnish when required "all such plans, specifications, and information as may be found necessary or expedient for the purpose" of reinstatement or replacement, and failure on the part of the insured to fulfil these requirements, or interference or hindrance by him in the work of reinstatement, will discharge the company of its obligation to reinstate, and not only so, but, it would seem, relieve the company of any other liability

under the policy, seeing that by the company's election to reinstate the contract has become one to replace instead of to pay a sum of money.

The Metropolitan Building Act [1] provides for reinstatement :—

(1) Where there is reason to suspect fraud on the part of the insured. In the words of the section (83): "Upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings, on fire."

(2) When any person interested in or entitled to the property requests reinstatement. "Upon the request of any person or persons interested in, or entitled unto, any house or houses, or other buildings, which may hereafter be burned down, demolished, or damaged by fire."

Under such circumstances the company "is authorised and required . . . to cause the insurance money to be laid out and expended, so far as the same will go, towards rebuilding, reinstating, or repairing" the property.

The Act has a twofold purpose: (1) to give protection against attempted fraud, "to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view to gaining to themselves the insurance

[1] See supra, page 101.

money, whereby the lives and fortunes of many families may be lost or endangered." Where fraud is suspected—and it is only where there is reason to suspect fraud that the company can enforce the provisions of the Act—the company is "authorised and required" to reinstate the building instead of making a money payment to the insured, and thus put a check on, say, an owner of property setting the building on fire, thus endangering "the lives and fortunes" of other people, in the hope of securing the proceeds of the policy.[1] (2) To prevent a person who has one interest in the building from benefiting at the expense of others who have different, and possibly only limited, interests —*e.g.*, mortgagor and mortgagee, landlord and tenant, lessor and lessee. The Act, therefore, gives the right to any person interested in or entitled unto the building, to request that the policy money should be laid out by the company in reinstating the building as far as the money will go. Lord Justice James, in the *Rayner* v. *Preston* case,[2] expressed the opinion that the provisions of the Act extended to a purchaser under a sale contract —*i.e.*, a person with an equitable interest in the property; but this opinion received no support from the Judge's colleagues on the bench.

In order to make the Act operative, it is necessary that the request for reinstatement should be

[1] If it is the insured who has committed fraud, there should be no obligation on his insurers either to pay or to reinstate, since the contract would be avoided through fraud. (See Condition 5, supra.)

[2] See supra, page 102.

made before the company settles with the insured, and then if the company ignores the request an action can be raised to restrain it from paying over the insurance money to the insured. The person claiming reinstatement, however, cannot do the work himself, and then ask the company to pay the cost. It is the company alone who is authorised by the Act to carry through the work; but in reinstating no more need be expended than the amount insured by the policy, nor will it be necessary for the company to reinstate if within sixty days after the claim has been adjusted the insured gives sufficient security to the company that he himself will expend the proceeds of the policy in reinstating, or if within the same period the insurance money is "disposed of to and amongst all the contending parties to the satisfaction and approbation" of the company.

As has already been stated,[1] the Act appears to apply to the whole of England, but not to Scotland (per Lord Watson: *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888)) or to Ireland, and relates to buildings and heritable fixtures, but not to moveables.

Condition 7 vests the company on the happening of a loss in certain rights relative to the property. These rights arise from the nature of the contract. By the terms of the condition the company, without being deemed trespassers, and without incurring any liability in connection with the property by doing so, may enter the premises in which the

[1] See supra, page 101.

fire has occurred, either for the purpose of extinguishing the fire or salving any property that can be salved.[1] The company may also take and keep possession of the property insured, and deal with it in such a way as it may consider necessary for the purposes of the loss. It may, *e.g.*, take possession of any property salved from the fire, either in order to protect it from further damage or deterioration, or to enable it to adjust the claim, and the condition is stated to be the company's authority and licence for doing all these things. But although the condition confers these rights upon the company, they must be exercised in a reasonable manner and for a reasonable time. The company cannot retain possession of the premises or the property longer than is reasonably required for the purposes of investigating the circumstances attending the outbreak of fire, and of adjusting the claim with the insured. It is entitled to all the facilities which are reasonably necessary in connection with the loss, and so long as the company acts in a reasonable manner, the insured cannot obstruct or hinder it in the exercise of its rights, under penalty of forfeiting all benefit under the policy if he does. Should, however, the company act unreasonably, and the insured suffer loss in consequence, the company may be

[1] In some large cities the companies maintain a corps of salvage men, whose duty is to attend fires and carry out salvage operations for the benefit of the companies. These men are the servants of the companies, and any interference with them by the insured, when carrying out their duties, would be a breach of the condition.

liable in damages to the insured for the loss so incurred.

Just as the company acquires these rights on the happening of a fire, so the same event imposes certain duties on the insured. These rights and duties are correlative, for the insurers and the insured have a mutual interest in the event and a mutual desire to lessen the consequences of it. Consequently, although the policy is intended to mitigate the loss to the insured, he cannot disregard the duties required of him by the nature of the contract—that is to say, he cannot rely on the protection of his policy and leave things to take their course, indifferent to what damage the fire may cause, so long as his loss is fully covered, for that would be a breach of the duty of good faith implied in the contract, and might imperil his rights to the benefits of the policy. To quote from the Marine Insurance Act: "It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss" (sect. 78 (4)), and the same applies in fire insurance. Thus, it is expected of the insured that he will take what steps are possible with a view to minimising his loss, or to averting any further loss, by having the fire extinguished, by removing out of danger any property that may be in danger from the fire, and protecting from further damage or deterioration any that may have already been damaged, and in these ways lessening the burden which, by having made the contract with them, he has transferred

to his insurers. The expenses incurred in performing these duties are included as an item of the claim.[1]

It may be appropriate at this point to discuss the question of salvage—a question of considerable importance in fire insurance, resting as it does on the law of indemnity. As the insurers are entitled to the advantage of anything that comes into the insured's hands that goes to diminish his loss,[2] if the salvage possesses any value, that must be taken into account in arriving at the amount of indemnity to be paid. In fire insurance what is termed "salvage" is the residue from the fire in a more or less damaged state, and if such residue has any value the loss cannot be called total. Salvage in marine insurance has a wider significance than in fire business. In fire insurance the term "salvage" is applied only to such property as is affected by the fire, but not wholly consumed. Any property that has escaped uninjured does not concern the loss. According to marine insurance practice, the goods need not necessarily be damaged in order to be called salvage. If they arrived at their port of destination in a damaged condition, then unquestionably they would be classified as salvage goods, meaning thereby that they are not sound, and if they were sold it would be as damaged or salvage goods. In that case the position would be similar to a sale of salvage stock from a fire. On the other hand, however, if goods *in an undamaged state* are discharged at an intermediate port and

[1] For payment of extinguishing expenses, see infra, page 339.

[2] See also chap. ix.

sold because it is found impossible to forward them to the port of destination owing to the ship having been disabled, the proceeds from such sale are technically termed salvage, and the loss is known as a "salvage loss." The goods in the latter case are of the nature of salvage goods, because, not being delivered at the port of destination, they have no commercial value to their owner, their value consisting in what they will realise at the place at which they have been discharged.

But in that case the insured will have *abandoned* the goods to the underwriters. By *abandoned* is meant that the insured has given notice to his insurers that he intends to transfer all interest in the subjects insured to them, and they thus become possessed of all the rights and responsibilities of ownership.[1] By thus abandoning the goods the insured ceases to have any proprietary interest in them, and the loss is made a total loss under the policy, or what is called in marine language a *constructive total loss*,[2] in contradistinction to an actual total loss, "where the subject-matter insured is destroyed, or so damaged as to cease to be a

[1] "Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured and all proprietary rights thereto" (sect. 63 (1), Marine Insurance Act, 1906).

[2] The Marine Insurance Act defines a constructive total loss as "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred" (sect. 60). *E.g.*, in the case of the ship, although it does not cease to be a ship, the damage done is likely

thing of the kind insured, or where the assured is irretrievably deprived thereof."—(Marine Insurance Act, sect. 57 (1).) There is, however, nothing in fire insurance analogous to this practice in marine insurance, of giving notice of abandonment and claiming a constructive total loss. A total loss in fire insurance can only arise where there is actual total destruction of the subjects insured so that nothing of them remains, or, to borrow the language of the Marine Insurance Act, where they "cease to be a thing of the kind insured." This being so, there is no place in fire insurance for the doctrine of abandonment, which in marine practice follows as the natural corollary of the doctrine of constructive total loss, and is based on the principle of indemnity. If an insured under a marine policy can claim a total loss under his policy, notwithstanding that the property insured has not been entirely lost, he must, if he is to receive no more than a full indemnity, transfer or abandon to the underwriter all his rights to the property. This, however, does not apply in the case of fire insurance, except that if the insured

to result ultimately in an actual total loss, or the damage may be so extensive that the cost of repairing would be greater than the value of the ship after repair; or where it is the cargo that is affected, although there is no actual total loss, as would be the case if the ship were sunk or a complete wreck, the cargo may be so damaged that the cost of reconditioning it at some intermediate port and forwarding it to the port of destination would exceed the actual market value of the goods at the port of destination. In these and other cases of a like nature the loss is said to be technically or constructively total, and the insured can abandon the subject-matter to the underwriter and claim on the basis of a total loss.

accepts a full indemnity for his loss he thereupon transfers or abandons all his interest in the salvage to his insurers, otherwise if he were allowed to retain the salvage after being fully indemnified he would recover more than his actual loss. "If the assured, who has been indemnified by the underwriter as on a total loss, saves anything upon the loss, that salvage must go to the underwriter, otherwise the assured would be more than indemnified." —Lord Esher: *Dane* v. *Mortgage Insurance Corporation* (1894).) Apart from this, the insured under a fire policy cannot abandon the salvage to his insurers [1] and claim a total loss. Although the company is given certain rights in connection with the property for the purposes of the loss, even to taking possession of it for the time being, the insured does not become divested of his interest in it, and if the salvage has any appreciable value, the company is entitled to have that value applied towards the reduction of the loss. Unless, therefore, the company is agreeable to such a course, the insured cannot, no matter how extensive the damage may be, compel the company to relieve him of the damaged goods and pay him their market price at the time of the fire; nor where a part only of a parcel of goods is damaged can he claim for the whole parcel on the plea that the assortment being broken the undamaged goods are

[1] The condition of the policy may specifically state that the insured "shall not in any case be entitled to abandon any property to the company, whether taken possession of by the company or not."

of no value to him. The undamaged portion remains the property of the insured, for the company is liable only for what has been directly damaged or destroyed by the fire, not for any indirect consequences of the fire.[1]

In practice the question of how the salvage is to be disposed of is a matter of agreement between the insured and the company. The insured may be allowed to retain the salvage, in which case he can only claim the net loss after taking into account the value of the salvage at the time of the fire; or the company may take over the salvage and sell it, in which event they may pay a full indemnity and retain the proceeds of the salvage for their own benefit, or they may account to the insured for the proceeds and pay the loss under deduction of the amount recovered by the sale of the salvage. In the case of an under-insurance, where the company pays the total sum insured by the policy, the insured retains the salvage, provided that what is paid under the policy together with the value of the salvage is not in excess of the loss; but where the policy is an average one, and through the operation of average the insured receives only a part of his loss, he becomes an insurer himself for the proportion which the amount of his under-insurance bears to the total value, and this being so, he shares in the salvage in the same proportion. The company cannot adjust the loss under average, and then appropriate the whole of the salvage to itself. It pays its proportionate share

[1] See supra, page 35.

of the net loss after deducting the value of the salvage, thus :—

Sum insured	£1000
Value	£1500
Loss	£1200
Salvage	300
Company's liability is $\frac{10}{15}$ of . .	£900

CHAPTER VII.

THE CONDITIONS OF THE CONTRACT (*continued*).

8. Contribution and Average.

Condition 8, known as the *Contribution Condition*, defines the extent of the company's liability when at the time of the loss there are other insurances over the same property and for the same interest. The condition is in two parts. The first part, which is really the contribution condition,[1] has the effect of distributing the loss amongst all the companies, who are each liable only for what is called a "ratable proportion."

Contribution arises where different insurers insure the same property for the benefit of the same interest. "Contribution exists when the thing is done by the same person against the same loss, and to prevent a man first of all from recovering more than the whole loss, or, if he recovers the whole loss from one which he could have recovered from the other, then to make the parties contribute ratably. But that only applies where there is the

[1] The second part of the condition sometimes appears as a separate condition.

same person insuring the same interest with more than one office."—(Lord Justice James: *North British & Mercantile Insurance Co.* v. *Liverpool & London & Globe Insurance Co.* (1877).) [1] The doctrine of contribution is based on the rule "that where the same default renders all co-sureties responsible, all are to contribute" [2] proportionately to the amount of their respective sureties (*Pendlebury* v. *Walker* (1841)). Applying this to fire insurance, where the same loss is covered by different insurers, each should share the common loss proportionately to the amount of their respective liabilities. Even if there had been no condition, each company insuring the same loss would be liable for its "ratable" share, but if the condition were absent from the policy, the insured could select the company against whom to claim, and the company would be bound to fulfil its contract with its insured, for it could not plead the existence of other insurances as an excuse for paying a part only of the loss. Having paid the loss, however, it would be entitled to contribution from its co-insurers. The condition, however, makes it one of the terms of the contract that where there are other insurances subsisting at the time of the fire, the insured cannot recover under the policy more than its *ratable proportion*, and he is thus compelled to distribute his loss among all his insurers.[3]

[1] See infra, page 131.

[2] Bunyon's 'Law of Fire Insurance' (5th edition, page 271).

[3] At one time it was made obligatory upon the insured by a condition of the policy to declare the fact that he had effected additional insurances, and to have the fact endorsed on his policy,

He cannot claim against any one of them, leaving it to take what action it chooses against its co-insurers; he must formulate his claim against them all. ". . . this clause (the contribution condition) was put in to say that the insured should, in the first instance, proceed against the several insurance companies for the aliquot parts for which they are liable in consequence of that condition."—(Lord Justice Baggallay: *North British & Mercantile* v. *Liverpool & London & Globe*, supra.) The policy condition, however, merely provides the manner in which the loss is to be apportioned under certain circumstances. It is not intended to take away any right the insured may possess under the policy, or deprive him of recovering the same indemnity he would have recovered had he been able to select the companies against whom to claim, as he could have done had the condition been absent from the policy.

It may be said also that the doctrine of contribution supports the law of indemnity, for by compelling the insured to distribute his loss, it prevents an insured who has effected insurances

otherwise the policy was void. Modern practice inserts a written clause in the policy known as the *insurance clause* which states that "insurances in other offices are allowed, the amounts to be declared in the event of loss." The necessity for such a clause is not quite obvious in view of the contribution condition. It is possibly a relic of old-time practice, which inserted the insurance clause in mercantile policies to cancel the printed condition against double insurances referred to. In some policies the condition narrating the procedure to be followed by the insured when a loss happens requires him to furnish particulars of any other insurances over the property. (See supra, page 107.)

over the same property with more than one company in excess of its value from recovering more than the full amount of his loss. "If the insured is to receive but one satisfaction, natural justice says that the several insurers should all of them contribute *pro rata*, to satisfy that loss against which they have all insured."—(Lord Mansfield: *Godin* v. *London Assurance Co.* (1758).) A contract of fire insurance being one of indemnity only, it follows that a double insurance does not entitle an insured to a double indemnity, for in no case can he be indemnified in excess of his actual loss, and, consequently, contribution: "that rule of practice, depends on the doctrine—one not of law only but of common reason—that a man who insures his interest in property against loss by fire . . . cannot recover from the insurer a greater amount than he has lost by the contingency insured against. So, in the case of double insurances of the same interest with different insurance companies, the assured will not be entitled to recover more than the full amount of the loss which he has suffered." —(Lord Justice-Clerk Moncreiff: *Scottish Amicable Heritable Securities Association, Limited*, v. *Northern Assurance Co.* (1883).)

The leading case on contribution in fire insurance is that of the *North British & Mercantile Insurance Co.* v. *Liverpool & London & Globe Insurance Co.* (1877) (known as the "King and Queen Granaries" case). A firm of merchants, Rodocanachi & Co., had a quantity of grain stored in the granaries belonging to Barnett & Co., and had covered it

along with other grain stored elsewhere by floating policies. The wharfingers, who by the custom of the trade were responsible for the safety of their customers' goods, had insurances in their own name to cover grain in their warehouses, their own and on commission, for which they were responsible. Following the fire which occurred in the granaries causing considerable damage, an action was raised to determine whether the companies insuring the merchants were liable for any part of the loss, or whether the companies who had the wharfingers' insurances were entitled to have their loss diminished proportionate to the amount insured by the merchants' policies—in other words, whether the wharfingers' insurers could claim contribution from the policies insuring the merchants. The court held that, the wharfingers being liable to their customers, were bound to meet that liability, and the companies insuring them were not entitled to any benefit from the policies which the merchants themselves had effected. Moreover, had the merchants enforced their contract with their own insurers, the latter must have paid under the policies, but would be entitled to sue for recovery from the wharfingers the amount paid, and no question of contribution could arise. In giving judgment, the Master of the Rolls (Jessel) stated that a wharfinger by the custom of the trade was responsible for the safety of the goods entrusted to him, "and if the goods are destroyed by fire, he is liable in law for breach of duty, in not so carefully attending to the goods that no fire could

destroy them." The merchants, therefore, could sue the wharfingers for recovery of their loss, and the companies insuring them were subrogated to their insured's rights against the wharfingers.

In the Appeal Court, which affirmed this judgment, Lord Justice Mellish said: "I can see no reason why the principle in respect of contribution should not be exactly the same in respect of fire policies as they are in respect of marine policies, and I think if the same person in respect of the same right insures in two offices, there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in the case of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights." [1]

The case is important in showing that there can be no contribution where the policies cover different interests in respect of the same subject-matter, and further, if one of these interests has any rights against the other, the company insuring

[1] Sect. 80 of the Marine Insurance Act, 1906, provides as follows:—

"(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

"(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt."

the interest possessing such rights is given subrogation to these rights. This, however, was contrary to the intention of the condition, which aimed at preventing more being recovered in the aggregate than the value of the property destroyed. So long as the policies covered the same property, the intention was that no one of them should pay more than its ratable proportion, any question of the individual rights of the several interests in the property being disregarded. What determined the question of contribution was whether the policies covered the same property, not whether they were benefiting the same insured.

As a result of the decision in the King and Queen Granaries case, the contribution condition was altered by the addition of the words "or persons on his behalf." Formerly the condition in general use was to the effect that if at the time of the fire there were any other subsisting insurances, "effected by the insured or any other person,"[1] covering the same property, the company was only liable for a ratable proportion. The judgment in the King and Queen Granaries case laid it down that contribution could not arise where different interests were insured. To meet this the words referred to were added in order that all

[1] The condition in the wharfingers' policy in the King and Queen Granaries case read: "If at the time of any loss by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its ratable proportion of such loss."

policies where there is a community of interest—either effected by the same insured or by some one else on his behalf—might be brought into contribution.

Before contribution can arise, therefore, it is necessary :—

(1) That all the policies should cover the same interest, thus constituting a double insurance, whereby the same person is benefiting by all the policies, whether these are in his own name or taken out by others for his behalf and with his knowledge or consent. This, however, does not refer to policies effected by different persons to cover their different and distinct interests in the same property, or their different liabilities in connection with it. A bailee, *e.g.*, who insures to cover his liability to the bailor for loss or damage by fire—whether his liability arises out of trade custom and usage or by the terms of a contract—does not effect the insurance on behalf of the bailor or for his benefit, but solely to cover his own liability to the bailor. Consequently, if the latter also effects an insurance in his own name, the two policies—as was brought out in the King and Queen Granaries case—cannot contribute, seeing that they are covering different interests and liabilities. If, however, the bailor asked the bailee to keep the goods insured for him, the policy

effected by the bailee would be on behalf of the bailor, taken out with his knowledge and consent and for his benefit, and would contribute along with any policy which the bailee might have applying to the same property.

(2) That the subject matter should be common to all the policies, though they need not be identical in range, so long as at the time of the fire the property affected is covered by all of them.

(3) That the peril which has caused the loss should be common to them all, although the policies may not all be identical in what they cover. Thus, a fire policy and a combined policy covering other perils in addition to fire, can contribute to a fire loss.

(4) That all the policies are valid contracts at the time of the fire.

(5) That they do not contain any provision which excludes them from contribution.

If the policies, although relating to the same subject-matter, cover different interests with distinct rights and liabilities, each interest insuring for himself alone so that there is no common interest insured by the several policies, the right of contribution, according to the rulings laid down in the King and Queen Granaries case, does not arise. Although in some cases this may result in more being paid in the aggregate than the actual value destroyed, still it would appear only equitable that such policies ought not to be brought into contribution with one another, as otherwise

an insured who had effected the insurance solely to cover his own individual interest would be deprived of a full indemnity for his loss because of something done by other parties in whom he had no concern and over whom he had no control. Instead of recovering his full loss, he would only recover a portion of it, and that merely because of the acts of other parties done without his knowledge and beyond his powers to prevent. It is no argument to say that he has rights against these other parties, and that in any case, even if he recovered his full loss, his insurers would be subrogated to his rights. The doctrine of subrogation does not relieve an insurer of his liability under the policy, and neither should the doctrine of contribution diminish an insured's rights against his insurers because of the existence of other insurances covering separate and distinct interests. If he has no claim to the benefit of these other insurances, they should not diminish the benefit to which he is entitled from his own insurance.

The following are examples of different interests in the same subject-matter :—

(*a*) First and second mortgagees, or bondholders.
(*b*) Landlord and tenant.
(*c*) Bailor and bailee.
(*d*) Mortgagor and mortgagee.[1]

[1] Lord Justice Mellish, in the King and Queen Granaries action, cited the case of a mortgagor and mortgagee as one where the doctrine of contribution would not apply. "But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case,

The respective interests of these are distinct the one from the other.

In the case *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.* (1883), it was held that a first bondholder was entitled to the full amount of his loss, and was not bound by the contribution condition to accept only a ratable proportion because other policies were in existence for other bondholders over the same property. Lord M'Laren, in giving judgment, stated as one of his reasons for refusing contribution, that under it "the right of the assured would be liable to be diminished by subsequent acts of parties not under their control. In the present case, for example, it is said that a second bondholder, by effecting his insurance, has diminished the claim of the first bondholder to a proportionate extent." Another reason given was that "in the case of a total loss it leads to the result that the indemnity is to be shared between the first and second bondholders in proportion to the amount of their insurances, though in equity the first bondholder, if covered by insurance, ought to recover to the extent of his bond, and the second bondholder ought only to recover the difference between that sum and the worth of the

it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. . . . If each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think whenever that is the case, the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

property, that difference evidently being the limit of his insurable interest."

Another action arising out of the same fire was brought by the second bondholders, the *Glasgow Provident Investment Society*, against the *Westminster Fire Office* (1887), who resisted the claim by their insured on the ground that the damage had already been fully paid under the first bondholders' policy, and consequently, there was nothing left to which their policies could attach. The Second Division of the Court of Session decided in favour of the insured, and this decision was upheld on appeal by the First Division and by the House of Lords. The Lord Chancellor (Halsbury), in giving his opinion, argued on the lines that before the fire the property was good security for all the bonds, but the fire had deprived the second bondholders of their security, and this was a loss for which they were entitled to be indemnified by their insurers. "I am wholly unable to understand how other contracts made with other people can affect the question once it is conceded that the property as it originally stood was sufficiently valuable to meet the demands of all." And in Lord Selborne's opinion, the second bondholders had lost by the fire "the whole of that interest in respect of which they were insured," and consequently had a *prima facie* right to indemnity for their loss. Had the damage been reinstated, that would have satisfied the claims of all interests; but the damage was not reinstated, and the amount necessary for reinstatement had been paid to the first bondholders.

The second bondholders derived no benefit from the amount paid to these. "The sum necessary to reinstate is one thing; the loss, if there be no reinstatement (which is the present case), is another."

The companies can, of course, if they choose to do so, modify the legal position by arranging among themselves for the apportionment of a loss where different insurances exist for different interests; but any arrangement made in this way is one that concerns the companies themselves, and cannot affect the insured's legal rights under the policy.

Since the contribution condition is a rule among the companies themselves for apportioning a common loss, and is not intended to prejudice the insured's rights under the policies, the question arises as to what the position would be if at the time of the loss one of the policies is not a valid contract. The condition refers to *subsisting insurances*, and a "subsisting insurance" is presumably an insurance *de facto*—one under which the company is liable to its insured, and under which the insured is able to recover his loss. A policy which is not a valid contract, and could not be enforced against the company at the time of the fire, cannot be a "subsisting insurance," and could not, therefore, be brought into contribution. If, *e.g.*, the insured at the time of the fire had two policies covering the property affected, but for some reason one of these was invalid, the other policy would require to meet the whole loss up to the limit of its liability. It could not claim contribution from the other, for there can be no

contribution from a policy which is not liable for any part of the loss. Such a policy is not an insurance at all.[1]

The position would seem to be the same where, at the time of the fire, one of the insurers is insolvent. If winding-up proceedings have commenced by the time the loss happens, there can be no claim against the policy, since the policy terminates when the winding-up proceedings have commenced,[2] and would not, therefore, be a "subsisting insurance." Should, however, the loss happen before the company goes into liquidation, the policy would be a subsisting insurance at the date of the fire; but as the insured might not be able to recover, it would be worthless for its purpose. In that case, if the loss is fully covered by the solvent companies—as might readily be the case where the loss is partial,—and seeing that the rule of contribution exists for the purpose of apportioning the loss, and is not intended to deprive the insured of his right to a full indemnity, should not the solvent companies take up the proportion of the loss falling to their insolvent co-insurer?[3] In doing this, however, they would require to be subrogated to the insured's rights as a creditor of the insolvent company.

[1] The standard policy condition does not use the term "subsisting insurance." It refers to "any other insurance . . . covering any of the property."

[2] The winding-up commences at the date when the petition for compulsory winding-up is presented to the court, or at the time when the resolution for voluntary winding-up is passed.

[3] Unless, as is frequently the case with schedule insurances, the policy expressly limits the company's liability for any loss or damage to a specified percentage.

Contribution does not arise where the contract is of such a nature as to preclude contribution. *E.g.*, an excess or a replacement value policy could not be brought into contribution. An excess policy exists for the sole purpose of making good to the insured any material loss which he has been unable to recover under the ordinary fire policy, and a replacement policy operates to cover the difference between what is paid under the fire policy and the cost incurred to replace what has been destroyed.[1] The fire policy pays according to the value of the property at the time of the fire. It does not take into account the outlays incurred by the insured in purchasing new property to replace what has been lost—that is the purpose of the replacement policy. Obviously, therefore, from the special nature of these policies, they cannot be brought in for contribution along with the ordinary fire policy, since the loss which they are intended to cover is a different loss from that covered by the fire policy. Neither, of course, is a policy subject to the two conditions of average brought in for a ratable contribution, since that policy by its special terms only operates to cover any excess of loss beyond what is covered by the specific policies.[2]

[1] See infra, page 390.

[2] It should be observed that Condition 8 of the standard policy would appear to have the effect of bringing in an excess policy—and possibly also a policy subject to the two conditions of average—for a manner of contribution. The condition in question provides: "If any other insurance effected by or on behalf of the insured is expressed to cover any of the property hereby insured, but is subject to any provision whereby it is excluded from ranking

Although the condition provides that where there are other insurances subsisting at the date of the fire the policy will not be liable for more than its ratable proportion of the loss, no definition of a "ratable proportion" is given. As has already been mentioned,[1] the condition is not intended to prejudice the insured's legal rights, or to diminish the indemnity to which he is entitled under the policies, and any apportionment of the common loss among the several policies which would deprive the insured of the amount he would have recovered apart from the condition could not be justified on the grounds of equity, for obviously if the insured is fully covered in the aggregate, he is entitled to recover his full loss. In the case of concurrent policies—*i.e.*, where they are identical in every respect except the sum insured—no difficulties arise in apportioning the loss. The insurers of such policies are, in the strict sense of the term, co-insurers of the same risk, each underwriting for a proportionate share. Each policy, therefore, contributes to the loss under similar circumstances; they have a common liability, and they all cover the same loss, no one of them covering more or

concurrently with this policy either in whole or in part or from contributing ratably to the destruction or damage, the liability of the company hereunder shall be limited to such proportion of the destruction or damage as the sum hereby insured bears to the value of the property." The effect of this is that in the event of there being an excess insurance the policy containing the standard condition becomes subject to average, the result of which would be to throw a larger share of the loss on the excess policy than would otherwise have been the case. See also page 151 for the importation of average from a policy subject to the two conditions of average.

[1] See supra, page 130.

less than the others. The policies, if they differ at all, differ in *extent* only, and, consequently, where such policies are concerned, the practice is to allocate the loss *pro rata* on insurances.[1]

The same method is employed in the case of non-average policies, which differ in range, but where the same loss is covered by them all, *e.g.*—

A policy insures X.
B policy insures X and Y.

If the loss is entirely in X, both policies are liable for the loss up to the amount of their respective sums insured, and in such a case the ratable proportion of each policy is the proportion which the sum insured by it bears to the total sum insured by all the policies, thus :—

A on X for .	£100	pays $\frac{1}{3}$.
B on X and Y for	200	pays $\frac{2}{3}$.[2]
	£300	

If, however, there is also a loss in Y, the sum insured by B policy cannot be appropriated entirely to meet the loss in X, since it covers also the loss in Y, and B is a co-insurer with A for a part only of the risk. The method of apportioning a loss under these circumstances is to take the mean between two apportionments—one of which proceeds upon the assumption that the whole of B's

[1] On the basis, *i.e.*, as if the loss were total and the policies liable to the amount of their insurances.

[2] If the loss is £150 on X and the value in Y is £150, by this method of apportionment £100 would be left from B's policy to meet a subsequent total loss on Y; so that although there is a full insurance in the aggregate, the insured would have £50 of his loss on Y uncovered.

policy covers the loss in X, and what remains over after meeting its share of the loss in X is applied to meet the loss in Y; the other reverses the process, and assumes that the whole of B's policy covers the loss in Y, applying what is left over to meet its share of the loss in X, thus:—

A on X .	£100	Loss on X	£60
B on X and Y	200	" on Y	50
	£300		£110

I. Greater loss first—

Risk.	Loss.	Liabilities A.	Liabilities B.	Pays. A.	Pays. B.
X	. £60	£100	£200	£20	£40
Y	. 50	...	200 − 40	...	50
	£110				

II. Lesser loss first—

Risk.	Loss.	Liabilities A.	Liabilities B.	Pays. A.	Pays. B.
Y	. £50	...	£200	...	£50
X	. 60	£100	200 − 50	£24	36
	£110			2)44	176
		Mean . .		£22	£88

In both of these apportionments, it will be noticed, the liability of the two policies is based on sums insured. The weakness of this method is that it sometimes leaves the insured with a part of his loss uncovered, notwithstanding that he is fully insured in the aggregate. The matter then resolves itself into a compromise between the policies, and the uncovered loss is allocated to them in such a way as to produce a result equitable to the insured.[1]

[1] Thus, if the loss had been total on both X and Y, the values being £100 and £200 respectively, the "mean" method would utterly break down.

Where the policies are average policies, the ratable proportion is based on the liability of each found independently of the others—that is to say, the amount which each policy would have paid had it been the only insurance—what is known as the independent liability method of apportionment,—and the common loss is allocated to each policy *pro rata* on the liabilities ascertained in this way, *e.g.* :—

A on X .	for £100	Value in X, £100	Loss on X, £80
B on X and Y "	£50	" " Y, 100	
		Total value, £200	

A (non-average) would be liable to the extent of the loss . . .	£80	and pay $\frac{8}{10}$
B under average would be liable for $\frac{50}{200}$ X £80	20	" " $\frac{2}{10}$
Total liability . .	£100	

If there had also been a loss on Y, the allocation would have followed the same principle, A being liable for $\frac{8}{10}$ths of the loss on X, and B for $\frac{2}{10}$ths, while B's liability for the loss on Y would be in the proportion of $\frac{50}{200}$ths.[1]

Except where average applies, the contribution condition takes no account of values, and the

[1] Nothing more is attempted here than to show in a general way the different methods adopted in practice under different conditions for ascertaining the ratable proportion. No criticism is offered on these methods, which cannot be said to follow any principle. They are rather rules of practice adopted by the companies as producing the most equitable results without prejudicing the insured's rights. The reader is referred to the various text-books on the subject for fuller information.

insured can recover his loss up to the amount of his insurances. This is inevitable, since in fire insurance the insured is not required to bear any share of the loss himself if he has sufficient insurance to cover it, unless the policy specifically declares it to be subject to average; in other words, there is no general application of average in fire insurance. As has already been stated, when the policies are average policies, the liabilities are first ascertained, and the loss then apportioned on the basis of these liabilities, and not on insurances, as in the case of non-average policies. It might happen, however, that some only of the policies are average policies, with the result that the non-average policies, being liable up to the amount of their insurances, would contribute proportionately more than the average policies, whose liability would be in the proportion which the sum insured bears to the value. The effect of this would be that in the case of two policies insuring the same risk for equal amounts, one subject to average and the other not, the former would, in the event of under-insurance, pay less than the latter, as shown in the example given below. This would be inequitable to the non-average policy, and it is to adjust this inequality that the second part of the condition appears in the policy. The effect of it is to convert a non-average policy into an average one, if at the time of the fire there is in existence an average policy for the same insured and applying to the same subject-matter, either alone or along with other property. Average is said to be *imported* from the average policy into

the non-average one, which then becomes subject to the same average, thus :—

A policy insures	£500	non-average.
B ,, ,,	500	subject to average (*pro rata*).
	£1000	total sum insured.

Loss	£120
Value at time of fire .	1200

If both policies were non-average, each would pay an equal share of the loss—viz., £60 ; but as B policy is an average one, its liability is diminished by the operation of average, with the result that, although both offices are receiving the same amount in premium, and both cover the same risk for the same amount, the one is paying a smaller share of the loss than the other, viz. :—

A is liable for the amount of loss .	£120	and pays $\frac{12}{17}$.
B is liable under average for $\frac{5}{12}$ of £120 =	50	and pays $\frac{5}{17}$.
	£170	

The condition adjusts this inequality. A becomes an average policy because B is an average policy, and both are made to bear a ratable share of the loss proportionate to their respective liabilities as ascertained under average, each being liable for $\frac{5}{12}$ths of the loss.

It will be noticed that by importing average from the average into the non-average policy, the insured is left with a portion of his loss uncovered, which would not have been the case apart from the condition. The condition, therefore, alters materially the complexion of the contract, and might be taken exception to on the ground that

the insured is being deprived of the benefits the contract originally undertook to give him. It should not be overlooked, however, that although the policy purports to be a non-average one, it contains an express stipulation which at any time may convert it into an average policy, and the insured accepts the policy with that stipulation. The contribution condition forms no part of the contract between the company and the insured, except that it restricts the company's liability to a ratable proportion of the loss, and compels the insured to distribute his loss among all his insurers; it does not affect the insured's rights under the policies. The average condition, on the other hand, forms a part of the contract with the insured, and specifies how the contractual obligations of the company may be affected by certain acts done by the insured, or under certain specified circumstances. The condition, however, can only be enforced under the same circumstances in which the contribution condition operates—that is, where the same interest is covered,[1]—for obviously the insured's rights cannot be prejudiced because of an insurance which some one else, with an interest in the property distinct from that of the insured, has effected for his own protection.[2]

The condition, however, is not uniform in all policies. In some the phraseology is such as to import average into a specific policy from a floating policy of wider range, while in others it only operates where the average policy covers solely

[1] See supra, page 128.

[2] See, however, infra, page 150.

property which "is in and subject to the same risk only" as that covered by the non-average policy: "And if such other insurance" (*i.e.*, "any other insurance, effected by the insured or by any other person, covering the property affected by the fire") "be subject to average and applies solely to property which is in and subject to the same risk only as the property covered by this insurance, then this insurance shall be subject to average in like manner." This condition has the effect of importing average from an average policy covering a different species of property to that covered by the policy containing the condition, so long as the property covered by the average policy "is in and subject to the same risk only" as that covered by the non-average policy. The condition does not state the "other insurance" is to cover the *same* property. If the average policy covers *property in and subject to the same risk* and no other property, that is sufficient to import average. Thus, if one policy covered wool in a specified warehouse subject to average, and another policy covered skins in the same warehouse non-average, average would be imported from the average policy into the non-average one, and that whether the two policies covered the same interests or distinct interests. The reason underlying this seems to be that, as the risk is no greater in the one than the other, and both policies have an equal chance, they should operate in similar conditions, and the insurer of the one should not be denied an advantage enjoyed by the other.

Another condition may read: "And if there

shall then be any other subsisting insurance effected by or on behalf of the insured on any of the property hereby insured either alone or together with any other property, which shall be subject to any condition of average, the insurance of such property under this policy shall be subject to such condition of average in like manner." [1] This condition would appear to have the effect of converting a non-average specific policy into an average one owing to the existence of a floating policy, which includes in its range property which is specifically insured by the non-average policy. There is no qualifying stipulation that the property covered by the floating average policy is to be in and subject to the same risk only as that covered by the non-average specific policy. The loss, therefore, would be apportioned by the independent liability method on the basis of their respective liabilities as brought out under average, as already explained.[2] Even a floating policy subject to the two conditions of average would seem by this condition to import average into a non-average specific policy. This, however, is not done in practice, the rule usually followed being that when a specific non-average policy and

[1] The standard policy condition is in the following terms :—

"If at the time of any destruction of or damage to any property hereby insured there be any other insurance effected by or on behalf of the insured covering any of the property destroyed or damaged, the liability of the (company) hereunder shall be limited to its ratable proportion of such destruction or damage.

"If any such other insurance shall be subject to any condition of average this policy, if not already subject to any condition of average, shall be subject to average in like manner."

[2] See supra, page 146.

a floating policy subject to the two conditions of average come together, the specific policy is exhausted first and the floating policy brought in to take up any excess of the loss not covered by the specific policy.[1] A strict interpretation of the condition, however, would make the specific policy an average one—that is, of course, *pro rata* average,—and the result would be that a greater liability would be thrown on the floating policy than would otherwise be the case if the specific policy paid as a non-average policy, *e.g.* :—

Risk.	A.	B. Subject to the Two Conditions of Average.	Value.	Loss.
X	£300	£500	£600	£400
Y	...		200	...
	£800		£800	£400

(1) Average *imported*—

A's liability under average $\frac{3}{6} \times$ £400 pays . £200

B's liability $\frac{500}{800-300} \times$ balance of loss £200, pays 200

£400

(2) Average *not imported*—

A's liability £300

B's liability $\frac{500}{800-300} \times$ balance of loss, £100 100

£400[2]

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[1] See infra, chap. xii.

[2] See also supra (note 2), page 142, for the effect of Condition 8 of the standard policy.

CHAPTER VIII.

THE CONDITIONS OF THE CONTRACT (*continued*).

9. Arbitration.
10. Permanency of Warranties.
11. Forfeiture of Premium.

Condition 9—*Arbitration.*—Differences arising out of a policy of fire insurance are usually settled by arbitration, and the condition in the policy—known as the *Arbitration Clause*—providing for this is an agreement between the company and the insured to refer to arbitration any difference that may arise. As the purpose of the arbitration clause is to avoid litigation, it goes further than this, and, speaking generally, stipulates—and the insured in accepting the policy agrees to the stipulation—that the reference of a dispute to arbitration shall be a condition precedent to the right of raising any action on the matter in dispute. An agreement to refer framed in these terms binds the company and the insured, and denies them the right to bring an action until an arbitration award has been

made.[1] "If the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until the condition is complied with."—(Kelly, C.B.: *Elliot* v. *Royal Exchange Assurance* (1867).) If the condition is not framed so as to make arbitration a condition precedent to an action in court [2] and one of the parties at variance raised an action, the other could apply to the court for stay of the proceedings until the question had been arbitrated and an award made; and unless there was some particular reason why the matter should not be arbitrated upon—as, for example, where it involved a difficult question of law—the court might exercise its discretion and grant stay of the proceedings. Section 4 of the Arbitration Act, 1889 (the English statue), provides for this. If any party to a submission commences legal proceedings against the other party, application may be made for stay of the proceedings, and the "court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were com-

[1] It is the usual practice to make a reference to arbitration a condition precedent to the right of raising an action on the matter in dispute. See the words italicised in the two conditions quoted on pages 157 and 158.

[2] If the words in italics in the two conditions quoted on pages 157 and 158 were omitted, the condition would then be merely an arbitration clause, and would be no bar to an action in court without prior arbitration, if either disputant chose that procedure.

menced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

As an arbitration clause which makes a submission to arbitration a condition precedent to the raising of an action does not deprive the insured of his right to raise an action after an award has been made, the courts have taken no exception to it, for there is in such a clause no question of "ouster of jurisdiction," as might be the case if the condition provided for all differences and disputes arising out of the insurance being referred to the decision of arbitrators, whose award is to be "conclusive and binding upon all parties," thus taking away any right of action under the policy. In the case *Scott* v. *Avery* (1855), the House of Lords laid it down that no agreement between parties to a contract could be made that has the effect of ousting the jurisdiction of the courts, although it is competent for the parties to covenant that before an action could be brought on the question in dispute, it must first be referred to the decision of a third party. This is what the arbitration clause in a fire policy does, and the House of Lords in the case *Caledonian Insurance Company* v. *Gilmour* (1893)—an appeal from the Court of Session, whose decision the House of Lords reversed,—upheld the arbitration clause, which in this case stipulated that the "obtaining of such an award should be a condition precedent to the commencement of any action upon the

policy," and elsewhere it has been held that a condition framed on these lines does not oust the courts of their jurisdiction.—(Lord Lindley: *Spurrier* v. *La Cloche* (1902)—a Privy Council appeal from the Royal Court of Jersey.)

The arbitration clause is a wise provision, and saves both the insured and the company much needless litigation and expense. It may not dispense with litigation altogether, but it may have the not unlikely result in the majority of cases of making further action unnecessary, for it is reasonable to expect that the two parties at variance will have sufficient confidence in their respective nominees to abide by whatever decision the arbitrators or umpire may arrive at.

The clause is not of uniform construction in all fire policies, but, as a rule, however the particular wording used may vary, provision is made for *all differences*[1] to be referred to the decision of an arbitrator chosen mutually, or, failing that, to two arbitrators, one appointed by each in writing, and an umpire appointed, in case of disagreement, by the arbitrators before entering upon the reference. In some policies the condition deals with the costs of the reference, either leaving the costs to the discretion of the arbitrators or umpire, who shall say how they are to be borne, or providing that each side shall pay its own costs of the reference

[1] Some conditions, however, may be more limited in their scope and provide only for questions as to the amount to be paid to be referred to arbitration, leaving any other question to be settled, if necessary, by the courts.

"and a moiety of the cost of the award," but in this also there is no uniformity. As the arbitration proceedings are governed by the Arbitration Acts applicable,[1] it would appear to be unnecessary for the policy condition to provide for anything more than that all differences arising out of the contract shall be referred to arbitration, with, of course, the stipulation which appears in most of the arbitration clauses, and which is really the essential part of the condition, that an arbitration award shall be a condition precedent to the right of any action against the company. The following is the clause adopted by one of the leading companies :—

> "If any difference shall arise between the company and the insured or any claimant under this policy, such difference shall be referred to two arbitrators mutually chosen or their umpire; *and unless and until an award has been made, no action or other legal proceedings shall be commenced in respect of any claim under or by virtue of this policy*";

while another is in the following terms :—

> "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the

[1] In England, by the Arbitration Act, 1889; in Scotland, by the Arbitration (Scotland) Act, 1894; and in Ireland, by the Common Law Procedure Amendment (Ireland) Act, 1856.

> parties, or in case of disagreement between the arbitrators, to the decision of an umpire to be appointed in writing by the arbitrators before entering on the reference; *and unless and until an award has been made the company shall not be liable for any loss or damage, and such award shall be a condition precedent to any liability of the company or any right of action against the company in respect of such claim.*"

These would appear to provide for all that is required.

There is nothing that is onerous in the arbitration clause of a fire policy, nothing that any fair-minded person can take exception to, or a nervous one be afraid of; nor—and it is well to bear this in mind—is there anything of a compulsory nature in the clause. It is erroneous to imagine that the companies hold the threat of arbitration over the insured to compel him to their way of thinking. The condition is meant not for purposes of aggression, but for protection; and while it may have been framed primarily in the interests of the insurers, it is not without advantage to the insured also, for in an arbitration reference the insured and the company are on an equal footing, and their respective claims will be adjudicated impartially and strictly in accordance with their merits.

The insured is not bound by the company's election of an arbitrator; if he prefers it, he may nominate some one of his own choice to represent him, leaving the company to follow a like pro-

cedure; and however the arbitration tribunal may be constituted—*i.e.*, whether it consists of a single arbitrator mutually chosen, or of two arbitrators, one appointed by each party, with an umpire, or oversman,—the reference must be conducted impartially and with strict justice to both parties. If his cause is just, the insured has nothing to fear from arbitration, and it certainly provides him with a speedier and less costly means of having his claims adjudged than by action in a court of law.

How important the arbitration clause in a fire policy is, not only to the company but to the insured also, will be readily understood if it is considered what would happen were no provision made for referring disputes to arbitration. In that case arbitration would not be obligatory; and while in most cases where a difference arose the companies would be willing to refer the question to arbitration, if it were incapable of being settled amicably, it is not every insured who would consent, with the result that the companies would either have to face costly litigation or agree to the insured's demands. This would be good neither for the companies nor for the insuring public, on whom the cost of fire insurance must ultimately fall;[1] nor would it be good for the ethics of the business, for it would give an inducement to unscrupulous persons to mulct the companies in exorbitant claims by exploiting their reluctance to be involved in litigation.

[1] See infra, page 292.

The arbitration condition confers a benefit on the insured also. If he considers that the company is not treating him fairly on any matter affecting his claim, he can exercise his right to have the question which forms the subject of difference between him and the company referred to arbitration. If no such right devolved upon him by the terms of the policy, either would he be compelled to accept the company's terms or have the dispute settled by a lawsuit; and as the former is what would be likely to happen in most cases, fire insurance, either rightly or wrongly, would be held in obloquy—a result unfortunate for everybody concerned, and one the companies are most anxious to avoid, for it is essential to the success of fire insurance in the purpose it is intended to serve that the utmost confidence should exist between insurer and insured.

Although the arbitration clause requires all differences [1] arising out of the contract to be submitted to arbitration, it becomes an important question whether the company can enforce the condition where, the policy having become a claim, liability is repudiated. The grounds upon which repudiation is based will determine the matter. If the company repudiates liability because of something which affects the validity of the contract and which goes to the root of the contract [2] —as, *e.g.*, where the absence of insurable interest

[1] It is the usual practice to provide for *all differences* being submitted to arbitration.

[2] See supra, page 75.

rendered the contract void *ab initio*,—it cannot deny the insured's right to raise an action before an arbitration award has been made, for it cannot contend that there is no binding contract, and at the same time seek to enforce one of the conditions of it. If, however, the repudiation of liability is based on the contract itself—as, *e.g.*, the breach of a warranty, or an express condition which relieves the company of its obligation to pay, or whether the company is liable under the particular circumstances of the loss,—the contract is still an existing one, its validity not having been affected, and the arbitration clause is operative. Questions, therefore, affecting liability, even when fraud is imputed, may be referred to the decision of an arbitrator. "It is made a term of the contract that certain conduct on the part of the insured will deprive him of any benefit thereunder; and whether he has been guilty of such conduct or not is a matter of difference arising out of the policy." —(Lord Justice Holmes: *Gaw* v. *British Law Fire Insurance Co.* (1908).)

Condition 10—*Permanency of Warranties.*—A warranty in a fire policy becomes an express condition, and its observance is a condition precedent to liability. A breach of a warranty would affect the insured's right of recovery in the event of loss in the same way as a breach of any other condition. If the policy contains a warranty against, say, the use of artificial light or heat; or if there is a warranty that no power is used; or that certain kinds of goods are not stored in

the building; or whatever else it may relate to, the insurers undertake the risk on the assumption that the warranty will be complied with *as long as the contract remains in force.* A warranty is binding on the insured throughout the entire currency of the policy, and not only at the time the policy was issued, or at the date when the warranty was attached to the policy. A duty is imposed upon the insured to observe the warranty as long as the insurance is in force. If he fails in this, the insurers are relieved of liability, and the insured, by his omission, is precluded from recovering under the policy.

That is the understanding and the intention; but if the warranty is couched in ambiguous language as to leave a doubt in the mind as to what was intended, the courts will construe the warranty against the insurers, as happened in an arbitration case where the question at issue was breach of a warranty, which read, "Warranted no process carried on." Without doubt the intention was that at no time during the currency of the policy was any process of manufacture to be carried on in the building; but counsel for the insured succeeded in convincing the arbitrator that the warranty, constructed as it was, applied only at the time the policy was issued, and the arbitrator made his award in favour of the insured. In consequence of this decision, the tariff companies agreed to insert in their policies the condition we are discussing in order to place it beyond doubt that a warranty does not apply only at the

time the policy is issued and during the first year of the insurance, but during the whole currency of the policy, and that a breach of a warranty at any time after it has been attached to the policy will absolve the company of liability, whether the risk is increased or fire caused thereby, or not.

The second part of the condition has the effect of modifying the legal position where a warranty has been violated. The breach of a condition may be waived by the company either categorically or inferentially. If a company continues an insurance or renews it, under the full knowledge that a breach has been committed, and the insured knows that the company knows of the breach, that amounts to a waiver, and the insured can plead that he was misled by the company's own act into thinking that the breach was immaterial. He must prove, however, that he was so misled. If the company continues the insurance or renews it, not knowing that the breach had been committed, that would not be a waiver, and the contract would become vitiated by the breach of the condition, no matter when committed, and irrespective of the fact that at the time of the loss there had been no breach.

The second part of the condition modifies this position, and the policy is not avoided by a breach of warranty committed during a preceding renewal period, so long as there had been no violation of the warranty during the then current period of the insurance. It should be noted that the condition relates to a breach of *warranty*, not to a breach of any other express condition.

Condition 11.—A fire policy sometimes stipulates that in the event of the contract becoming void, or for any reason ceasing to be in force, the premiums which have been paid are forfeited. This condition is inserted because, under certain circumstances, the insured could claim a refund of the premium—*e.g.*, where no liability has ever been run, the risk never having attached. The liability to indemnify for loss is undertaken in consideration for the premium which the insured has paid. If the company has never incurred any liability under the policy, and no risk has ever been run, the insured may be entitled to a return of the premium on account of the failure of the consideration for which the premium was paid. The Marine Insurance Act provides (sect. 84 (1)) :—

"Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured."

The contract may have been void *ab initio*, either because the insured never could have sustained a loss—as, *e.g.*, where he had no insurable interest,—and, consequently, the purpose for which the contract was made—viz., to indemnify for loss—never existed; or it may have been avoided *ab initio* owing to a breach of some condition or a breach of good faith; or for other reasons it may never have been a binding contract, and, consequently, incapable of being enforced. In these cases the company, not having been "on the risk,"

the insured, in the absence of any express condition, may be entitled to a refund of the premium paid, except perhaps where the contract has been void owing to fraud. Section 84 (3) (*a*) of the Marine Insurance Act states: "Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable."

And, similarly, where owing to over-insurance the company could never have been liable for the full amount insured, the insured, it would appear, could claim for a return of the premium on the amount of the over-insurance. Section 84 (3) (*e*) of the Marine Insurance Act provides for this as follows: "Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable."

If, however, the policy contains a condition stipulating for forfeiture of the premium in the event of the policy becoming void for any reason, the insured is barred from claiming any return of the premium paid.[1]

[1] See also infra, page 242.

CHAPTER IX.

SUBROGATION.

THE doctrine of subrogation[1] is the natural corollary of the principle of indemnity, or, as Lord Justice Brett expressed it: "That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned—*i.e.*, indemnity,—and it is a doctrine in favour of the underwriters or insurers, in order to prevent the assured from recovering more than a full indemnity: it has been adopted solely for that reason."—(*Castellain* v. *Preston* (1883).) It may be defined as the rule which places the company in the position of the insured in respect of whatever rights and remedies the latter possesses against any third party primarily liable to him, in whatever way the liability arises, to make good the loss sustained, for "where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers

[1] *I.e.*, substitution: same as surrogate—viz., a substitute.

for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured."—(Lord Jüstice Brett: *Darrell* v. *Tibbitts* (1880).) The company is subrogated to *every* right which the insured possesses—whether he exercises his right or not,—by which his loss can be diminished, and to *every* remedy which can be applied to reduce or extinguish the loss, whether the remedy has been applied or not. To quote again from Lord Justice Brett's judgment in *Castellain* v. *Preston*, the leading case on subrogation: "Now, it seems to me that, in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, viz., that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is

the fundamental condition, I must have omitted to state something which ought to have been stated."

As the doctrine of subrogation is applied in a contract of fire insurance "in order to prevent the assured from recovering more than a full indemnity," it follows that an insured who has been indemnified by his insurers may not retain for his own use anything which he may subsequently receive that goes to reduce his loss. It is important to note that Lord Justice Brett, in the course of his deliverance in the *Castellain* v. *Preston* case, laid it down that a company was not given subrogation rights merely to enable it to enforce a contract on behalf of the insured against a third party—*e.g.*, to enforce performance of a liability which some third person had contracted with the insured in connection with the subject matter, such as the liability of a warehouseman for goods belonging to other people; or the fulfilment of a contract entered into with the insured, as, for instance, a contract of sale. "The full and absolute meaning of the word must be used," so that whatever reduces the loss to the insured reduces the company's payment under the policy. The rule of subrogation applies, therefore, whenever and under whatever circumstances the insured has any right or benefit against some other person, either in terms of a contract or covenant, or at common law. It applies also wherever, after the loss has been paid, any payment is received from a third party—whatever may be the special cir-

cumstances under which the payment is made—that goes to reduce or extinguish the loss; and it applies also so as to give the insurers the advantage of any benefit which in any other way goes to reduce the amount recoverable under the policy, such as any value the salvage remaining over after the fire may possess.[1] "The general rule of law . . . is that where there is a contract of indemnity . . . and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."—(Lord Blackburn in *Burnand* v. *Rodocanachi*, quoted by Lord Justice Cotton in *Castellain* v. *Preston.*)

In the case of *Darrell* v. *Tibbitts* (1880), the insured, the landlord of a house which he had leased with a covenant by the lessee to be responsible to him for loss or damage to the property by fire, was paid, on the occasion of the building being damaged by fire, by his own insurers under the policy which he had effected with them in his own name. The Appeal Court, however (reversing the judgment of the lower court), held that he was answerable to the company for repayment of the amount, since his loss had been made good by the lessee in terms of the covenant of the lease;

[1] See supra, page 122.

otherwise if he were allowed to retain the money he would be more than indemnified for his loss. "If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would not be merely indemnified, he would be paid twice over." In this case the landlord's loss was remedied by the tenants, who repaired the damage as they were obliged to do, and the landlord's company, therefore, were entitled to the advantage of the remedy which had been thus applied, for "immediately after the insurance company had paid the landlord, they were put into his place in regard to the contract to rebuild, which was a contract respecting the subject-matter insured."

If, therefore, the insured has two remedies for his loss—one against the insurers, and the other against the person liable for the loss,—he can only recover from one of these. If he seeks to recover his loss from the insurers—as will invariably be the case,—the company is bound to indemnify him to the extent of its liability, for it cannot insist on the insured claiming in the first instance against the person primarily liable; but having been paid his loss under the policy, the insured must transfer to the company any rights and remedies he possesses against the person on whom the primary liability rests. There is no formal act of subroga-

tion:[1] the mere fact that the insured has accepted a full indemnity from his insurers subrogates the latter in their insured's rights, for " . . . according to all the rules of law we have a right to imply a promise on the part of the landlord to the insurance company at the time of payment by them, that if the loss should be afterwards made good by the tenants, he would repay the money which he received from the insurance company."—(*Darrell* v. *Tibbitts* (1880).) Every right which the insured possesses in regard to the subject-matter, whether the right arises out of a contract or in any other way, must be subrogated to the insurers.

The well-known King and Queen Granaries case[2] is an example of subrogation arising from liability under a contract. The wharfingers had contracted liability for their customers' goods, and had insured to cover that liability. The wharfingers being primarily liable, it was on the policies which they had effected that the whole loss fell, and although the merchants had insured in their own name, they had nevertheless a claim against the wharfingers; and had the merchants been paid by their own insurers, it was held that the latter would become subrogated to their insured's rights against the wharfingers for recovery of the loss.

The *Castellain* v. *Preston* (1883) case, which has

[1] Although it is the practice, where the insured has a remedy against a third party for his loss, for the company when paying the claim to take subrogation of his rights. For a form of discharge embodying subrogation, see Appendix.

[2] *North British & Mercantile Insurance Co.* v. *Liverpool & London & Globe Insurance Co.*, see supra, page 131.

already been referred to, illustrates how the doctrine of subrogation may operate where the liability of the third party rests upon the fulfilment of a contract. A purchaser had entered into an agreement for the purchase of a building which, in the interval before the purchase price was paid, was burned. The seller, who already had a policy over the property in his own name, was paid the amount of his loss by his own insurers, the Liverpool & London & Globe Insurance Co., who were unaware of the existence of the sale contract, and at the date arranged for the completion of the contract received the balance of the purchase price—a deposit having been paid when the sale contract was arranged—from the vendor, without any reduction on account of the fire. The company, exercising its subrogation rights, raised an action for recovery of the amount which it had paid to its insured, and on appeal was successful, the Appeal Court, reversing the judgment of the lower court, holding that the insurers were entitled to get back from their insured an amount equal to what they had paid him under their policy.

Similarly a company who insures a mortgagee's interest as mortgagee may have subrogation rights against the mortgagor, who, notwithstanding the fire, is still liable for the mortgage debt; for if the mortgagee in the event of a loss received payment of his loss from his insurer, and at the same time enforced repayment of the mortgage debt, unless the company possessed subrogation rights he would be paid twice over: he would receive

the value of his interest under his policy, and also repayment of his loan.

Another subrogation case, that of the *West of England Fire Insurance Co.* v. *Isaacs* (1896, affirmed 1897), arose out of a lessee's renunciation of his rights against the lessor, and serves to illustrate how wide the ramifications of the doctrine of subrogation can be. Certain property was leased for a term of years, the lease containing a covenant by the lessee to repair and keep in repair the demised buildings, and to insure them with the "Royal Exchange" in the joint names of the lessor and lessee. The lessee sub-leased a part of the property, and by the terms of the lease he covenanted to keep the property insured, with the stipulation, however, that if his insurance proved insufficient, the sub-lessee was to be liable for the balance under the repairing covenant of the lease. The sub-lessee insured with the "West of England"; a fire occurred in the building sub-leased; claims were made against both companies by their respective insured, and both claims were paid; but ultimately the "West of England" brought in an action to recover the amount they had paid to their insured, basing their action on the ground, *inter alia*, that the lease had given their insured certain rights against his lessor to which they would have been subrogated had their insured for reasons of his own not renounced them. By such renunciation he had deprived them of their subrogation rights against the lessor, who was liable under the lease to make good the damage done by

the fire. The Appeal Court, affirming the decision of the lower court, gave judgment in favour of the company.[1]

In the exercise of their subrogation rights the insurers can, without asking the insured's consent —and whether he consents or not,—institute proceedings *in his name* for recovery of the loss, and they are under no obligation to account to him for anything they may recover in excess of the loss. The insurers, however, cannot take action in their own name; they can only sue in name of the insured, who cannot refuse to give his name to any action his insurers may raise. Where, however, the insurance is insufficient to cover the loss, with the result that the insured has not received a full indemnity from his insurers, the position is somewhat altered. The company's subrogation rights are in respect of the payment which it has made to the insured under the policy, and it is because of that payment that it claims to stand in the insured's place with regard to any claim capable of being enforced against the person primarily liable for the loss; but if the insured has not been fully indemnified, the company is subrogated only to the extent of its payment, and not to all the insured's rights in respect of the loss. Thus, if against a loss of £3000 the insured was paid £2000 under the policy and recovered £1000 in an action, the company would have no

[1] The fact that the company when it paid its insured's claim knew that he had a right against his lessor did not affect the subsequent action for recovery of the amount.

claim on the latter amount, since the insured had received no more than an indemnity. If, however, instead of £1000 he received £1500, the excess of £500 over his actual loss would be held by him on behalf of the company, whose payment would be reduced to that extent. Any balance of loss remaining over after the company has paid is a matter that concerns the insured alone. He may, if he chooses, renounce his right against the person responsible for the loss so far as that balance is concerned, but he cannot give an absolute release for the whole loss, nor if he raises an action for recovery can he restrict the action to the balance uncovered by insurance: he must sue for the *whole* loss. The reason for this is obvious. If a third party is liable, he is liable for the entire loss, and not for a portion only; and if the insured were allowed to sue only for the uncovered part of the loss the company's subrogation rights would be valueless. Consequently, if an insured raises an action in his own name for recovery of the uncovered balance of his loss only, the company may apply to the courts for an injunction to restrain him from doing so. Lord Justice James, in the *Commercial Union Assurance Co.* v. *Lister* case (1874), where the insurance was not sufficient to meet the whole loss, stated that while the insured was entitled to conduct the action against the wrong-doer, and was not obliged to give his name to the insurers in any action by them, he would neverthe-less be accountable for anything he might do in-consistent with his duty to the company. "If he

does anything in the conduct of the action inconsistent with his duty . . . he will have to make good any loss thereby incurred." Under the special circumstances of the case—the insurances were for £33,000, while the damage was estimated at £56,000, with a sum of £6000 in name of loss of profits,—the insured was allowed to control the action, having given an undertaking to sue for the full amount of the loss, but "subject to a liability to answer to this court for anything which, upon the hearing of the cause, should be shown to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case." Even, therefore, where the insured has a substantial claim on his own account, such as in this case, he cannot do anything that might prejudice the company's subrogation rights.

In the *Smidmore* v. *Australian Gaslight Co.* (1881) case, where also the insurance was inadequate, the insured gave the gas company an absolute release of their liability in consideration of their compensating him for the balance of loss uncovered, and agreed not to allow any person to use his name in an action against them. The court disallowed this, holding that the insured could only give release for the uncovered balance, and could not do anything to defeat the company's subrogation rights.

But subrogation may arise also out of a liability resting on the common law for tort—*i.e.*, for fire caused wilfully or through culpable carelessness or neglect, or the liability may be one imposed by

statute; and it makes no difference that the loss is covered by insurance, or that the insured has already been indemnified by his insurers under their contract with him,[1] for the fact that a contract of fire insurance exists under which the person who has suffered the loss has his loss made good to him, does not affect the primary liability of the person who caused the loss. The contract is made for the purpose of indemnifying the insured, not for relieving a third party of his liability. Subrogation, therefore, has the effect of saddling liability for the loss on the person responsible in damages at common law to the insured for having caused it.

There is now no liability at common law for damage done to other people's property by an *accidental* fire;[2] but where the fire is due to carelessness or neglect, liability for the damage so caused rests upon the person responsible, whether it is by his own act or the act of his servants. In France the law appears to lay greater responsibilities on the individual for loss and injury caused by fire than is the case in this country. A tenant in France is, *e.g.*, responsible to his landlord not only for any damage done by fire to his landlord's property, but also for any loss of rent the landlord

[1] Lord Kyllachy, in *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Railway Co.* (1892), stated: "I am not able to see that the fact of the pursuers being covered, or nearly covered, by insurance makes any difference in their position. It may be that they are really suing on behalf of the insurance company, but that is, after all, merely a matter of process."

[2] See infra, page 203.

may suffer in consequence of the fire. Although a tenant is exempt from liability if he can prove that the fire was due to faulty construction of the building, or to disrepair, or that it was fortuitous in origin, or spread from a neighbouring building, until he proves that it was attributable to one or other of these causes he is presumed to be at fault. This liability—what is known as the *risque locatif*—gives the tenant an insurable interest in the building, and he may insure to cover that liability. The landlord also has a liability to his tenant for loss or damage to the tenant's effects if the fire is due to a fault in the building or to neglect in the upkeep of it. But before the landlord can be held liable, the tenant must establish the fact that the fire was caused in that way, for there is no *prima facie* presumption of fault in the case of a landlord as with a tenant. Moreover, both landlord and tenant have a liability, corresponding to their individual liabilities to each other, if the fire causes damage to the property of third parties; but before liability can be fixed on either of them, the person whose property has been destroyed or damaged must prove that the fire was the result of culpable carelessness or neglect—that is to say, if a fire brought about in that way spread to adjoining property, the damage must be made good by the tenant or landlord of the building in which it originated, according to which of them is liable for the original fire. This liability, called the *recours des voisins*, together with the *risque locatif*, may be insured along with

the ordinary insurance for the insured's own property under the same policy. Under such circumstances as these subrogation rights in France are exercised much more frequently and to a greater extent than in this country, for in every case where a loss arises the company will settle the claim with its own insured, taking subrogation of his rights against whomsoever by the law of France can be held responsible for the damage done—either landlord, or tenant, or neighbour, as the case may be.[1]

Fires caused by railway locomotives at one time were a prolific source of worry to the fire insurance companies, and invariably a loss on agricultural produce supposed to have been caused by sparks from a railway locomotive was settled "taking subrogation." This, however, was largely a matter of form, for unless there was clear proof that the fire was due to culpable negligence or carelessness, there was no liability on the railway company if the line was being worked as authorised by statute. The Railway Fires Act[2] has modified the position somewhat, and now if it can be proved that a locomotive caused a fire, the railway company are liable under the Act to the extent of £200

[1] It should be noted, however, that there is not much, if any, dissimilarity between the law of France and the law of England on the question of liability for loss or damage by fire, except that there is not in this country, as there is in France, any *prima facie* presumption of guilt where a tenant is concerned. (See also infra, page 203).

[2] Railway Fires Act, 1905, and Amendment Act, 1923—under the original Act the limit of liability was £100.

for damage to agricultural crops, as defined in the Act. But notwithstanding that the farmer has a claim against the railway company, his insurer must settle his claim under the policy taking subrogation of his rights against the railway company, who are primarily liable in terms of the Act. The Act, however, does not relieve the railway company of its common-law liability if the fire is due to negligence. All that the Act does is to modify the previous position, where a railway company escaped liability if no negligence could be proved against it. The Riot (Damages) Act, 1886, is an instance where the companies are given subrogation rights by statute.[1] They can claim against the local authority for recovery of the compensation paid to their insured.

To summarise, if the insured is entitled to be compensated for his loss by any person besides his insurers, such person is said to have the primary liability; and the insurers, if they have paid the amount of the loss, are subrogated to the insured's rights against these persons, for by the payment which the insurers have made they succeed to all the ways and means by which the insured might have reimbursed himself for the loss. If there had been no insurance, the person who has suffered the loss would have sought remedy against the person responsible to him for the loss, in whatever way that responsibility arose. The fact that a policy of insurance exists does not alter that position. If the insured has a remedy against the third

[1] See supra, page 69.

party he must enforce it, or leave it to the company to take action on his behalf and in his name; in other words, the insured cannot renounce his rights because he is insured, nor can the person primarily liable escape that liability because the loss happens to be covered by insurance. But, while the insured is not permitted to renounce his rights against the person primarily liable, nor is the latter allowed to escape liability because the loss is covered by insurance, neither is the insured permitted to accept a full indemnity from his insurers, and at the same time retain for his own use the amount he recovers from the person primarily liable. Whatever is recovered in this way must be applied to the reduction of the loss paid by the insurer. The company's subrogation rights, however, are limited to whatever reduces or extinguishes the loss *covered by the policy*; they do not include anything received as compensation for contingent or consequential losses—such as loss of profits—not falling within the scope of the insurance. Nor does a company acquire subrogation rights from an *ex gratia* payment.[1] Such a payment is of the nature of a gift or gratuity, and is not made in discharge of any liability arising out of the contract.

[1] See infra, page 338.

CHAPTER X.

INSURABLE INTEREST.

It is assumed in a contract of fire insurance that the insured possesses what is called an *Insurable Interest* in the subject-matter. That is one of the cardinal principles of the contract, for an insurance unsupported by an insurable interest would be a gambling transaction and without legal sanction. Whether the Gambling Act [1] makes a *fire* policy void in the absence of insurable interest is perhaps not of material moment here, since on general principles no claim can arise under the policy if the insured has not suffered loss, which cannot happen if he has no interest in the property damaged or destroyed. If the fire has not deprived him of a benefit which he derived either from the possession of the property or from some contract affecting the property, then he has incurred no loss, and there is nothing for which he can be indemnified.[2] Lord Eldon, in *Lucena* v. *Craufurd* (1806), defined interest as "a right in the property or a right derivable out of some contract about the property insured, which

[1] Life Assurance Act, 1774 (14 Geo. III., chap. 48).

[2] See supra, chap. iii.

in either case may be lost upon some contingency affecting the possession or enjoyment of the party"; and Mr Justice Lawrence's definition in the same case was in the following terms: "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it. Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit or advantage arising out of or depending on such thing may be considered as being comprehended."

If the insured is legal owner of the property, there can be no doubt about his insurable interest. Ownership is the simplest form of insurable interest,

for obviously, where the insured is the owner of the property, its damage or destruction will involve him in a direct personal loss. Even if he is part owner or joint owner with some one else, he still has an insurable interest. But it is not necessary, in order to establish a right to insure and to recover in the event of a fire, that the insured must be vested in the legal title to the property either as owner or part owner. His interest may depend on other things, and, speaking generally, where the insured stands in such a relation to the property —or "is so circumstanced with respect to it"— that he benefits by its preservation and is prejudiced by its destruction, he possesses an insurable interest sufficient to support a contract of fire insurance, for the happening of the peril insured against will so affect his relation to or concern in the subject of the insurance as to produce a damage, detriment, or prejudice to him. But it must be established beyond doubt that the destruction of the property *will* involve him in a direct loss. It is not sufficient that the fire has deprived him of something which he had an expectation of possessing at some future date, for his expectation might never be realised, whether the property were destroyed or not, and, consequently, his hope of possession is uncertain. To quote Lord Eldon again: "Expectation, though founded upon the highest probability, is not interest, and it is equally not interest whatever might have been the chances in favour of the expectation."[1] Thus, an heir-at-

[1] *Lucena* v. *Craufurd* (supra).

law, however certain his succession to the property may be, has no insurable interest, for "the law will not allow that he has any interest or anything more than a mere expectation."[1] On the other hand, an assured future interest is insurable, as the destruction of the property will deprive the beneficiary of a benefit.

The interest may be either a proprietary one, an interest arising out of actual ownership (or part ownership), or a beneficial one, arising out of the benefits to be derived from the safety of the subjects insured. The first presents no difficulties, but the second requires some consideration.

A beneficial interest is established in a variety of ways:—

1. In terms of a contract, whereby one party undertakes to be responsible for the safety of the property entrusted to him and belonging to another party. This is a common form of insurable interest, and is provided for in the phraseology of the policy when it states that the subject insured is either "the property of the insured or held by him in trust or on commission, *for which he is responsible*."

The words in italics are important. Lord Campbell, in the case *Waters* v. *Monarch Fire Insurance Co.* (1856), found the company liable for customers' goods under the terms of the policy which stated that goods belonging to the insured "and in trust or on commission" were insured. As the insured held goods in trust for some one else, he was entitled to

[1] *Lucena* v. *Craufurd* (supra).

the entire value of the goods, holding the balance, after satisfying his own loss, in trust for the owners. Following this judgment the companies amended the wording of their policies by the addition of the words "for which he is responsible," and in a later action (*North British & Mercantile Insurance Co.* v. *Moffatt* (1871)), where the policy had adopted the altered wording, it was held that the company only covered *the insured's liability* for the goods in trust. The policy wording as now employed insures, in addition to what belongs to the insured, any property in his custody for the safety of which he is liable at law to the owners. The liability must be a legal one, capable of being enforced against the insured, and the insured's right to recover under the policy in respect of these goods will depend upon whether the owner of them has any legal claim against him for their loss. It is this liability which constitutes the insured's insurable interest in the property. The policy itself is not a declaratory statement that the insured *is* liable.

2. Under a contract of sale. This applies to sale of property as well as to sale of goods. If a binding contract has been entered into for the sale of a property—one that is capable of being enforced against either party,—the purchaser becomes vested in an insurable interest, for the safety of the property is a matter of concern to him, seeing that (unless the sale contract provides otherwise) if it were destroyed, even before the actual conveyance of the property to him had been completed, he would still require to fulfil his bargain with the

seller. A purchaser takes all the advantages and all the risks arising out of his purchase. If the property increases in value after the contract has been made, he makes a profit: if it diminishes in value he loses; and in like manner if the property is destroyed by fire the loss falls on the purchaser. The seller, of course, has also an insurable interest, for until the sale contract is completed he possesses the legal title. Both buyer and seller, therefore, possess an insurable interest, and both may insure to protect their respective interests; but the purchaser has no right to the benefits of the seller's policy unless his interest has been endorsed on the policy;[1] nor can the seller participate in the benefits of any policy the purchaser may have effected in his own name; and whenever the legal title to the property passes absolutely to the purchaser, the seller becomes divested of all insurable interest he formerly possessed, and the policy is void against him.

In the case of goods bought and sold, the position is regulated by the Sale of Goods Act,[2] unless there is something to the contrary in the covenant of sale.

Section 20 of the Act states that: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

"Provided that where delivery has been delayed

[1] See supra, page 98.

[2] Sale of Goods Act, 1893 (56 & 57 Vict., chap 71)

through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Sections 16, 17, 18, and 19 of the Act give the property in the goods to the seller or purchaser according to whether—

(*a*) The goods have been ascertained.

(*b*) They are in a deliverable state.

(*c*) Any condition relating to the sale has been fulfilled.

Goods are said to be ascertained when they are appropriated to the contract—*i.e.*, when they are removed from bulk and earmarked as the particular goods purchased. Thus, a dealer contracts with a farmer to purchase so many tons of that season's hay crop. Until the quantity is set aside, weighed, baled, and ready for delivery, the goods are said to be unascertained. So long as they are so, the property in the hay rests with the seller and is at his risk.

"Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained" (sect. 16).
But once the goods are ascertained and appropriated to the contract, the property in them passes to the buyer, and they are at his risk.

In the case of a sale of specified goods in a deliverable state, the risk is with the buyer immediately the contract is made, as he becomes vested in the ownership of them, and that whether or

not they are paid for, and whether delivery of them is taken at the time or at some later date. "Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." (Sect. 18, Rule 1.)

Rule 2 of the same section stipulates that where specific goods are sold, but in order to put them in a deliverable state something requires to be done to them, until the buyer has notice that they are ready for delivery, the property in the goods is with the seller, and the risk lies with him. "Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof." (Sect. 18, Rule 2.)

And similarly, where specific goods in a deliverable state are sold, but require to be weighed, measured, or tested for the purpose of ascertaining the price, they do not pass to the buyer until that has been done and the buyer informed. "Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof." (Sect. 18, Rule 3.)

If the contract of sale relates to goods purchased from a sample or pattern, Rule 5 of Section 18 passes the ownership in the goods to the buyer whenever they have been appropriated to the contract.

"(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that descritpion and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract." (Sect. 18, Rule 5 (1) and (2).)

Goods sold on approval become the property of the buyer :—

"(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

"(*b*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the

> return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact." (Sect. 18, Rule 4.)

The whole question of insurable interest in goods which form the subject-matter of a sale contract turns upon the ownership of the goods.[1] If the Act vests the buyer with the property in the goods —that is to say, if he is looked upon as being the owner—then he and not the seller has the insurable interest; but if the property in the goods rests with the seller, he alone has the insurable interest, and the buyer if he does insure can have no claim, as the legal title to the goods is not his, and consequently he loses nothing by their loss.

An unpaid vendor who has parted with the goods has no insurable interest to support a claim in the event of the goods becoming lost before payment is made. The property in the goods by the terms of the Act has passed to the buyer, and the seller has therefore no longer any insurable interest in them; nor can a vendee to whom the property in the goods has passed, but who has omitted to insure them, have any right to the benefits of the seller's policy, unless otherwise provided for. The seller's policy is not available once the interest has passed to the buyer.[2]

Notwithstanding that the property in the goods has passed to the buyer, an unpaid seller who has

[1] Or what the Act calls the "property" in the goods.

[2] See supra, pages 98 and 187.

not parted with the goods may still retain an insurable interest in them in respect of his lien for the purchase price. By a "lien" is meant that the seller has a right to keep possession of the goods until the price is paid. Section 39 of the Act stipulates :—

"(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

"(*a*) A lien on the goods or right to retain them for the price while he is in possession of them ;

"(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;

"(*c*) A right of resale as limited by this Act.

"(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer."

And in Scotland an unpaid seller who still retains possession may arrest the goods by the ordinary process of arrestment in Scotland, and may sell them as payment of his debt, what is known as poinding.

"In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding ; and such arrestment or

poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party." (Sect. 40.)

It may happen that by the terms of the sale contract or by trade custom or usage, notwithstanding that the property in the goods has passed to the buyer, the seller is still liable to the buyer for their safety as long as they remain in his custody. Section 55 of the Act, therefore, provides that :—

"Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

Thus a parcel of goods may be sold, but instead of taking delivery of them the buyer for some particular reason may allow them to remain in the seller's warehouse. Under ordinary circumstances the goods would be at the buyer's risk, and he alone would have the insurable interest; but if it is one of the conditions of the sale that the seller is responsible for the goods while they are in his warehouse, then he has contracted liability for them, and consequently has an insurable interest. The buyer also, of course, has an insurable interest, seeing that he is the owner of the goods, but if he insures them in his own name and recovers under his policy in the event of a loss, his company is subrogated to his rights against the seller, who is primarily liable.[1]

[1] See supra, chap ix.

3. *Trustees, Executors, Administrators, and Beneficiaries.*—A trustee has an insurable interest *as trustee* in the property which forms the subject of the trust. He may not be under any obligation to insure, either statutory or otherwise, and may not be under any penalty for not insuring (unless, of course, he is required by the terms of the trust to insure); but if he does insure, he has a *bona-fide* insurable interest in virtue of his office. The insurance effected by a trustee—even if it is voluntary on his part, he being under no obligation to insure, the premiums being paid out of his own pocket—is, of course, on behalf of and for the benefit of all the beneficiaries of the trust, whether their names appear in the policy or not, and in the event of a fire the proceeds of the policy are held as part of the trust property, "it being a rule of equity that a trustee . . . cannot reap any benefit through his trusteeship, but must hold any collateral advantage gained from the trust property as subject to the trust." [1]

Executors and administrators under a will possess an insurable interest in their representative capacity. They may not be bound to insure unless directed to do so by the will, but if they do insure, they have a *bona-fide* insurable interest, and in the event of a fire can recover, holding the proceeds of the policy as part of the estate.

A beneficiary, even before he is vested in full legal ownership, and in the meantime has only an equitable interest in the property, may insure

[1] Bunyon's 'Law of Fire Insurance,' 7th edition, page 45.

it in his own name, since if it were destroyed he would suffer a distinct loss.

4. The other various kinds of *limited owners*—*i.e.*, persons who are not the legal owners of the property having the absolute disposal of it, but who have a partial or limited interest in it, in respect of some liability which they have in connection with the property, or of some benefit they derive from it. Their interest, though limited, is still of such a nature that they would suffer loss through the damage or destruction of the property. The test of an insurable interest must always be whether the insured has such a right or interest in the property that the loss will be detrimental to him, either because it has deprived him of an advantage he derived from the property as owner, or arising from some profit or benefit accruing to him in connection with it, or because the loss of the property has involved him in a loss by reason of some liability relating to it which he must fulfil. Whatever the nature of the interest may be, if it is sufficient to support a contract of fire insurance, the courts will uphold it, for "it is the duty of a Court always to lean in favour of an insurable interest, if possible, for after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection and one which has no real merit as between the assured and insurer."—(Lord Esher: *Stock* v. *Inglis* (1884).) The question immediately arises as to what extent a person with a limited interest may insure—*i.e.*, whether to the

extent of his interest only, or for the full value of the property. Lord Bowen, in *Castellain* v. *Preston* (1883), stated that: "It is well known in marine and in fire insurances that a person who has a limited interest may insure, nevertheless, on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected, he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure." That is to say, if he insures for himself and in trust for others, he can recover the full value of the property, provided, of course, the sum insured is sufficient; but if the insurance is for his own limited interest—as, *e.g.*, a bondholder insuring for the amount of his loan,—he cannot be paid in excess of his own particular interest.

The following are examples of persons with a limited interest:—

(*a*) A *mortgagee* (or bondholder, or heritable creditor, to use the terms employed in Scotland) has an insurable interest in the property mortgaged, or disponed, to him as security for his loan. The mortgage deed (in Scotland, the bond and disposition in security) vests the mortgagee in the legal title to the property, with certain rights over it, as long as the loan remains unpaid, and gives him such an interest in the property that a fire would be to his detriment, for if the property were destroyed the mortgagee would lose his security, or if it did not wholly deprive him of his security, a fire might so diminish the value of the property as to make it no longer good security for the loan. The interest which he thus acquires in the mortgaged property—an interest which arises not because of the debt, for a debt alone gives a creditor no insurable interest in the debtor's property in the absence of any lien or charge upon the property, but because the property has been conveyed to him as security for the debt—entitles a mortgagee to insure to protect his interest either by a policy in his own name to the extent of his loan as representing the value of his interest, or, as is frequently the case in Scotland, by a policy in the joint names of himself and the proprietor in reversion (the equivalent to the English term "mortgagor") for their joint interests and to the full value of the property; or, as is the practice in England, he may insert in the mortgage deed a covenant by the mortgagor to keep the property insured, with certain stipulations as to payment of the premium, and,

in the event of loss, the manner in which the proceeds of the policy are to be applied.

A *mortgagor* (or proprietor in reversion) has an insurable interest in the mortgaged property to its full value, and his interest remains until foreclosure by the mortgagee.[1] His interest, however, is distinct from that of the mortgagee. "The interests of the mortgagor and mortgagee are distinct interests; the mortgagee does not claim his interest through the mortgagor, but by virtue of the mortgage which has given him an interest distinct from that of the mortgagor."—(Lord Esher: *Small* v. *United Kingdom Marine Mutual Insurance Association* (1897).) Although he has conveyed the property to the mortgagee as security for the loan, and his interest is changed from a legal to an equitable one, he has not parted absolutely with his whole interest in the property; he is still in possession of the property, and so long as he retains an equity of redemption may redeem his legal title by repaying the loan. He still re-

[1] In England foreclosure makes the mortgagee absolute owner of the property, but instead of foreclosing the mortgagee may sell the property and repay himself out of the proceeds of the sale. In Scotland the bondholder or heritable creditor (the equivalent to the English term mortgagee) does not, as a rule, enter into possession of the property in the event of failure on the part of the mortgagor to repay the loan; he recovers his debt by selling the property, and the bond contains a clause giving powers to the bondholder to sell the property if the loan is not repaid within three months after a formal demand for repayment is made. Should, however, he fail to find a purchaser, sect. 8 of the Heritable Securities (Scotland) Act, 1894, empowers him to enter into possession and he then becomes absolute proprietor.

tains his interest in the property notwithstanding that he has conveyed it to secure a sum of money. A mortgagor, moreover, is still liable to the mortgagee for the mortgage debt, whether the property is destroyed or not, and can apply the proceeds of his policy either in restoring the property or in extinguishing the debt, although he may be under no obligation to do either; but if he has omitted to effect an insurance to cover his interest, he can have no claim against any policy which the mortgagee may have taken out for his own protection; nor, in the absence of any provision to the contrary, has an uninsured mortgagee any interest in the mortgagor's policy effected by himself for his own security.

Whether an uninsured mortgagee can rely on the provisions of the Fires Prevention (Metropolis) Act, 1774,[1] and ask that the proceeds of a mortgagor's policy be applied in reinstating seems to be doubtful. The authorities are at variance on the point. Lord Selborne, in the case of *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), doubted whether the Act applied as between a mortgagee and mortgagor; whereas Mr Justice Parker, in *Sinnott* v. *Bowden* (1912), notwithstanding the doubt expressed by Lord Selborne, held that the mortgagees in that case were entitled under the statute to require the money paid under the mortgagors' policy to be applied in reinstating the property. The Act has been held not to apply to Scotland.[2] A bondholder in Scot-

[1] See supra, pages 101 and 117. [2] See supra, pages 101 and 119

land is given powers under section 119 of the Titles to Land (Consolidation) Act, 1868, "to insure all buildings against loss by fire," the premium being charged against the debtor. If he omits to exercise these powers and goes uninsured, the bondholder apparently has no redress, and can only rely on the solvency of the debtor, or his willingness to expend the proceeds of his policy in rebuilding.

If a mortgagee insures for his own interest only, he is not entitled to insure for more than that, and cannot be indemnified in excess of his own particular interest, although he can recover the full extent of his loss irrespective of any other insurances in other interests over the property, for between such policies there can be no question of contribution.[1] Lord Bowen, in *Castellain* v. *Preston* (1883), stated the position thus: "If he has the legal ownership, he is entitled to insure for the whole value; but even supposing he is not entitled to the legal ownership, he is entitled to insure *prima facie* for all. If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest." A

[1] See supra, chap. vii.

mortgagee who has insured for his own interest, and has been indemnified for his loss under the policy, must subrogate his insurers in his rights against the mortgagor, for he cannot recover his loss under the policy and also receive repayment of his loan from the mortgagor.[1]

The Conveyancing and Law of Property Act of 1881 (44 & 45 Vict., chap. 41) makes certain provisions for the insurance of mortgaged property, and empowers a mortgagee, where the mortgage is made by deed and subject to any provisions contained in the mortgage deed with regard to insurance, "to insure and keep insured against loss or damage by fire, any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property" (sect. 19), the premium to be charged to the mortgagor. The sum to be insured by the mortgagee is limited by the Act (sect. 23 (1)) to the amount specified in the deed, or if no amount is specified, to two-thirds of the amount which would be required in the case of total destruction to restore the property. A mortgagee, however, cannot effect an insurance under the Act in any of the following cases:—

(1) Where the mortgage deed declares that no insurance is required;

(2) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the deed; or

(3) Where the mortgage deed contains no stipu-

[1] See supra, page 172.

lation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor to the amount for which the mortgagee is by the Act authorised to insure—*i.e.*, the amount specified in the deed or two-thirds of the reinstatement value as mentioned above. (Sect. 23 (2).)

A further provision of the Act is that: "All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received." (Sect. 23 (3).)

The statute, which is an English one and does not apply to Scotland, does not overrule anything that may be expressed in the mortgage deed relating to insurance, its purpose seemingly being to empower a mortgagee, where no other provisions exist, to effect an insurance over the mortgaged property for his own security. The statute is less favourable to a mortgagee in England than the statutory powers conferred upon a bondholder in Scotland, who, whether he insures to the extent of his own particular interest or jointly with the debtor for the full value of the property, can charge the cost of the insurance against the debtor. A mortgagee in England who effects an insurance outside the Conveyancing Act to protect his own interest in the property, and there is no special contract with regard to insurance, cannot charge the mortgagor with the premium nor can he claim repayment of the premium from the mortgagor if he discovers

that the latter already has an insurance over the property, for in that case he had no powers under the statute to insure. Moreover, a bondholder in Scotland is not restricted, as is the case under the English statute, in the amount for which he can insure.

(*b*) *Tenants and Lessees.*—At one time by the common law of England a person who allowed a fire to break out in his premises was liable for any damage done by the fire to his neighbour's property, whether the fire was caused accidentally or by negligence. And where a tenant allowed the demised premises to be damaged or destroyed by fire, whether accidentally or by negligence, that was held to be waste for which the tenant was liable to his landlord. The position with regard to *accidental fires* was amended by the Fires Prevention (Metropolis) Act, 1774,[1] in which it was enacted that no liability rested on any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin. A tenant, consequently, is not, merely by virtue of his tenancy, responsible for the consequences of accidental fire. The lease or tenancy agreement may, however—and it not infrequently does,—contain a repairing and maintenance clause by which the tenant covenants to uphold and keep the property in repair during the term of the lease. This in itself does not impose upon a tenant in Scotland any liability for acci-

[1] The Act, as has already been stated, is of general application in England, but does not apply to Scotland. (See supra, pages 101, 117 and 199.)

dental fire, although it seems to do so in England, unless there is some contrary provision in the lease. The lease, however, especially in England, may contain also some provision for insurance whereby the tenant covenants to keep the property insured either in the name of the landlord or in the joint names of landlord and tenant, with certain stipulations as to the sum to be insured, the payment of the premium, and the manner in which the proceeds of the policy are to be applied in the event of a loss arising. His covenant imposes upon the tenant certain obligations which he is bound to fulfil under penalty of a breach of covenant, and gives him an insurable interest in the property sufficient to support a contract of fire insurance; and generally, as between landlord and tenant, or lessor and lessee, if the tenancy agreement places any duty on the tenant or lessee with regard to the preservation of the property so that he is liable to the landlord or lessor for its safety and good repair, that would seem to confer an insurable interest on the tenant sufficient to enable him to effect an insurance to cover his liability to the landlord or lessor, except in Scotland, where accidental fire is regarded as a *damnum fatale* for which the tenant cannot be held responsible, and in England unless the lease or tenancy agreement makes other stipulations in regard to fire damage.

In addition to any liability imposed upon the tenant by the terms of the lease, he may also have an insurable interest in any improvements made

by him on the property, as provided for in the Agricultural Holdings Acts.[1] If a tenant who has covenanted to keep the buildings under repair but is under no special covenant to insure, does insure in his own name for any liability he may have under the covenant to repair, and the landlord also insures, the two policies in the event of a loss could not be brought into contribution,[2] but whatever remedy the landlord had against the tenant by the terms of the lease would be subrogated to the landlord's company.

In any case a tenant in England has an insurable interest in the *rent*, seeing that, notwithstanding that the building may be so damaged by fire as to be no longer fit for occupation, the tenant is still liable for rent, unless otherwise provided. Apart from any special contract in the tenancy agreement a landlord is not bound to reinstate, and, of course, the tenant has no claim against the landlord's policy. He may possibly take advantage of the Fires Prevention (Metropolis) Act, 1774, and as a person interested in the property request the company insuring the landlord to expend the insurance money in reinstating.[3] In Scotland a fire relieves the tenant of any further liability for the rent, so long as the premises remain untenantable, and for that reason it is usual for the landlord to include in his policy an item covering the rent of the property.

[1] 8 Edw. VII., 1908, chap. 28; 13 & 14 Geo. V., 1923, chap. 10.

[2] See supra, page 137.

[3] See supra, page 117.

(c) *Bailees—i.e.*, persons in possession of goods belonging to others, such as warehousemen, wharfingers, factors, consignees, carriers, pawnbrokers, and innkeepers. These also have a limited interest. Except in the case of the last three—viz., carriers, pawnbrokers, and innkeepers,—the bailee has no responsibility to the bailor apart from his liability under the common law for negligence, unless by the terms of the bailment, or according to trade custom and usage, he is responsible for the safety of the goods entrusted to him, or unless he has agreed to keep the goods insured. A bailee has a limited interest in respect of his lien on the goods for his charges, and he may insure that. He can also insure the whole value of the goods, but his right to recover under the policy will depend upon whether he has insured the full value, and whether he is responsible to the bailor, seeing that, as is the usual practice, goods belonging to others and held by him in trust or on commission can only be covered to the extent of the bailee's liability for them.

(i) A *consignee* is the agent appointed to take delivery of goods belonging to his principal. He may be empowered to sell the goods, receiving commission on the sale; or he may pay the consignor a sum as an advance on the goods, recouping himself from the proceeds of the sale; or he may simply take delivery on behalf of his principal. Thus, a farmer sends a quantity of wool to a wool broker, who sells it for him, and charges a commission on the price obtained for the wool; or a

merchant abroad ships a cargo to his consignee in London, and at the same time draws upon him by means of a bill of exchange for part payment of the consignment; or he may merely give instructions that the goods are to be delivered to his consignee. A consignee, whatever his category may be, is not the real owner of the goods, and if he insures them in his own name can do so only to the extent of his limited interest arising from his lien on the goods for charges, commission, or advances.

The leading case on a consignee's interest is *Ebsworth* v. *Alliance Marine Insurance Co.* (1873)—a marine case. The consignor had shipped a quantity of cotton to the value of £5000 from Bombay to London, drawing upon the consignees for £3000 as an advance on the cargo. The cotton was insured under an open policy in name of the consignees and for behoof of the other interests, and the action was brought by the consignees to recover the value of the goods which had been lost on the voyage. The whole question turned upon the extent of the consignees' insurable interest. Lord Esher, in giving judgment, considered that they had an insurable interest, "because they had an existing contract with regard to the cotton, by virtue of which they had an expectancy of benefit and advantage arising out of, and depending on, the safe arrival of the cotton"; and with regard to the amount of their insurable interest, this was limited to the amount of their advances, or to the amount of their interest under the con-

tract. "The plaintiffs being only consignees to sell, under advances, and with a contract right to earn commission, but not being the legal owners of the cotton, could only properly insure, so as to recover in their own name, the £3000 for which they were liable on their acceptances, and any commission they would have earned by selling."

(ii) A *common carrier—i.e.*, one who carries goods from one place to another for hire—is responsible for the safety of the goods entrusted to him, and is liable for any loss howsoever caused, except it be by an act of God or the King's enemies. He may insure to cover his liability. The Carriers Act, however (11 Geo. IV. & 1 William IV., 1830, chap. 68), relieves a carrier of liability in the case of certain articles specified in the Act of over £10 in value, if the nature of these articles and their value is not declared, and the increased charge announced by the carrier as being required for the carriage of such articles, paid. The carrier, however, is not entitled to this relief if the loss is due to the felonious act of his servants or to his own misconduct. A carrier may limit his liability by a special contract, but he is not allowed to do so by a public notice.

It should be noted that the carrier's responsibility commences from the time the goods are delivered into his charge, and continues during transit until they are delivered at their destination. When transit is ended, and the goods are warehoused, waiting for the consignee to take delivery, the carrier is then in the position of a bailee, and

his liability is that of a bailee.[1] In Scotland, however, it would seem that the carrier is liable for loss by accidental fire as long as the goods remain in his custody or possession.[2]

(iii) An *innkeeper* is responsible for the safety of the property of his guests, but the Innkeepers Act of 1863 (26 & 27 Vict., chap. 41) limits his liability for "loss of or injury to goods or property brought to his inn" by any guest to £30, unless—

(1) The loss is due to "the wilful act, default, or neglect of such innkeeper or any servant in his employ"; or

(2) Unless the goods "shall have been deposited expressly for safe custody with such innkeeper."

In these cases the innkeeper would be liable for the whole loss. The provisions of the Act do not extend to "a horse or other live animal, or any gear appertaining thereto, or any carriage." In the event of loss or injury to these, the innkeeper would therefore be liable to the full extent of the loss.

The Act provides further that if an innkeeper refuses to accept goods for safe custody, he deprives himself of the benefit of the Act—that is to say, if a guest asks the innkeeper to keep certain articles of value in safe custody for him and the innkeeper refuses, he would be liable for any loss as a result of his refusal. He could not plead the protection of the Act. Moreover, the innkeeper is deprived of the benefit of the Act if he fails to exhibit a copy of the first section of the Act "in

[1] See supra, page 206. [2] See infra, page 211.

a conspicuous part of the hall or entrance to his inn."

The common law liability of carriers and innkeepers is adopted from the Roman edict—*nautæ, caupones, stabularii*—which made a shipmaster, innkeeper, and stabler responsible for the safety of the goods and effects entrusted to their care. The edict was promulgated to protect a traveller against the risks to which he was peculiarly exposed from collusion to dispossess him of his property. Consequently, if he gave his goods into the custody of the persons mentioned in the edict, they were bound to keep them safe for him and restore them to him intact, or be liable to him for their loss, no matter how the loss came about, provided it was not due to an act of God or the enemies of the State. The edict has been incorporated into the law of England and Scotland, and common carriers,[1] innkeepers, and livery stable keepers are held liable for the safety of the property committed to their charge, subject to the modifications provided by the special statutes applicable to them. The bare act of receiving goods in their capacity of carriers or innkeepers lays upon these persons a responsibility for the safety of the goods, even although no negligence can be proved, and makes them liable to the owner for any loss, unless the loss is due to an inevitable accident or the King's enemies.

[1] Although the edict relates to shipmasters, this has been applied by the law of England and Scotland to all common carriers by land or water.

In an action heard in the Scottish courts (*Mustard* v. *Paterson* (1922), on a claim for damages against a livery stable keeper for injury to a horse while stabled in the livery keeper's stables, it was held that according to the law of Scotland the edict applied, and the livery keeper was found liable in damages to the owner of the horse. The Lord Justice-Clerk, in delivering judgment, stated with reference to the edict: "Its necessity arose from the opportunities for collusion between persons falling within the categories alluded to (*i.e.*, ship-masters, innkeepers, and stablers) and their servants, guests, and others—opportunities which in the view then taken justified the imposition of a high standard of care upon them." In the opinion of the court the stable proprietor in this case could only escape liability if he proved that the injuries to the horse arose from inevitable accident or the King's enemies; it was not sufficient to plead that the usual precautions had been taken to avoid injury.

In Scotland an accidental fire is regarded as a *damnum fatale*—*i.e.*, an inevitable accident,[1]—and consequently loss caused by fire would not come within the scope of the edict, unless the fire was due to collusion or fraud or to culpable negligence. An exception to the general rule of *damnum fatale* is made in the case of carriers by section 17 of the Mercantile Law Amendment Act, 1856, which is in the following terms: "From and after the passing of this Act any carrier for hire of goods

[1] See supra, page 6.

within *Scotland* shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carrier." The Act makes no provision for articles of special value, and a carrier in Scotland, therefore, would appear to be liable for accidental fire irrespective of the nature or value of the goods.

(iv) A *pawnbroker* is given an insurable interest in a pledge by section 27 of the Pawnbrokers Act (35 & 36 Vict., chap. 93, 1872) as follows: "Where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable, on application within the period during which the pledge would have been redeemable,[1] to pay the value of the pledge, after deducting the amount of the loan and profit, such value to be the amount of the loan and profit, and twenty-five per cent on the amount of the loan.

"A pawnbroker shall be entitled to insure to the extent of the value so estimated."

5. A *contractor* or tradesman who has contracted to execute certain work and is paid on completion of the work has an insurable interest in it, although done upon the property of another, until he receives payment of the contract price or payment of an instalment for such part of the

[1] *I.e.*, within twelve months from the date of pawning, plus seven days' grace (sect. 16). Unredeemed pledges of ten shillings or under become the absolute property of the pawnbroker. Pledges of over ten shillings when unredeemed can only be disposed of by the pawnbroker by sale by public auction.

work as is so far executed, for if it should be damaged or destroyed by fire in the interval the loss would be his (unless the contract provides otherwise).[1] Thus, if a builder contracts to carry out certain alterations or additions to a house, until he has been paid for his work he has an insurable interest to the extent of the value of the materials and labour expended in the work. And if a tradesman has a lien for his charges for work done he possesses an insurable interest in the property upon which he has the lien. Thus, if he undertakes certain repairs to an article or does certain work in connection with it, and has a lien on it for his charges, he can insure it to the extent of his lien.

6. Any one who has a liability, whether under statute or otherwise, for loss or damage to other persons' property caused by an accidental fire brought about during the ordinary operations of

[1] In Scotland, *e.g.*, a building contract may be subject to the general conditions of contract contained in the Scottish National Building Code, Condition 26 of which provides that "the works executed under this contract shall be at the sole risk of the employer (*i.e.*, the person for whom the work is to be done), as regards any loss or damage by fire, and in the event of such loss or damage being so occasioned, the contractor shall be entitled to receive from the employer the full value of all work then executed." This, it will be observed, applies only to *work which has been executed*, and which in the absence of any special provision would be at the contractor's risk if not paid for. It should be noted, however, that by Condition 5 of the general conditions of contract, the employer is given the absolute property in all plant and materials required for the execution of the work "from the time they are placed upon the site until final completion of the works to be executed under this contract," and the contractor is responsible to the employer for any loss or damage to these.

his business, has a limited interest in the property in respect of such liability. A colliery owner, *e.g.*, may be liable to a neighbouring farmer for damage done to his crops by the working of the colliery, and a railway company has a limited liability by statute for damage to agricultural land or agricultural crops.[1]

7. An insurance company has an insurable interest in respect of the interest it possesses in the subject-matter of its insurance. It is for this reason that an insurance company can effect a reinsurance for property for which it is directly liable under its policy.[2]

It is not necessary, as a rule, that the nature of the interest covered should be described in the policy, although in practice this is frequently done, as in the case of mortgagees, trustees, and others who have only a limited interest in the subject-matter of the insurance. "Insurable interest" usually implies a direct interest in the safety of the property—an interest which would be prejudiced on the happening of the peril insured against. Cases may arise, however, where the only interest the insured has in the safety of the property is the expectation of some future advantage which may be imperilled by the destruction of the property. He has no direct interest in the safety of the property such that if it were destroyed he would be involved in an immediate pecuniary loss,

[1] Railway Fires Act, 1905, and Amendment Act, 1923. (See also supra, page 179.)

[2] See infra, chap. xvi.

but only a collateral interest which need not necessarily be prejudiced by the damage or destruction of the property. When an interest of this nature is insured it becomes necessary to describe it, for it is the real subject-matter of the insurance. A shareholder, for example, has no direct interest in the property of the company in which he holds shares. His only interest in the property is that its destruction may deprive him of the return which he hoped to receive from the employment of his capital, and if he insures the property it can only be in relation to the dividends which he might lose if the property were destroyed. And in like manner where the destruction of the property may result in a loss of the profits anticipated from the employment of capital, if such loss is to be covered it is necessary for the nature of the interest to be stated in the policy. A fire policy in the ordinary terms insuring the material loss from the damage or destruction of the property does not cover loss of anticipated profit.[1] For the same reason where rent is insured—either the rent derivable from the use of the building or from the site on which the building stands—it can only be insured as rent ; it cannot be covered by an insurance on the building.[2] Again, where the insured is insuring property which he holds in trust for some one else, or holds for sale on commission, before he can recover in respect of such property the nature of his interest requires to be described, since by a condition of the policy goods in trust or on commission are not

[1] See supra, page 33. [2] See supra, page 41.

insured unless specially mentioned. This enables the insured to recover to the full extent of the material loss or damage to the property—within the limits of the sum insured—and not merely for his lien for his charges and commission. In insurances of this description, however, the policy usually makes the further stipulation that the insured is liable to the owner of the property for its safety, and it is that liability which is covered.[1] It has been held (*Mackenzie* v. *Whitworth* (1875)) that where the interest is of a peculiar nature likely to vary the nature of the risk and increase the company's liability beyond what would ordinarily be expected (such as the interest referred to in 6, page 213, supra), it becomes necessary to describe the interest, since under these circumstances the interest is the subject-matter of the insurance.

[1] See supra, page 185.

CHAPTER XI.

THE PROPOSAL AND THE POLICY.

A CONTRACT is made when one party makes an offer and the other accepts it. If a price is offered for certain goods and the price is accepted, that is a contract of sale, and in fire insurance if a proposal is made and the proposal is accepted, there is a binding contract of insurance notwithstanding that the premium may not have been paid, and it would seem to be equally binding although made orally, unless payment of the premium is made a condition precedent to liability.

But a contract of fire insurance differs from other contracts in this, that the observance of the utmost good faith by both parties during the preliminary negotiations is essential to its validity, for any breach of duty in that respect would be fatal. The duty to observe good faith applies especially to the proposer, although the insurers also have a like duty to him, for they must not induce him by erroneous or misleading statements to make a contract unfavourable to himself, or having made the contract burden it with impossible or intolerable conditions.[1]

[1] See supra, chap. v.

A proposal to effect an insurance may be made either verbally, or by letter, or by the completion of a proposal form. In practice a proposal is made as often the one way as the other, and in the majority of cases is made through the medium of an agent appointed by the company to introduce business. Unless he has authority to do so, the agent cannot commit the company in any way. His capacity may be, and usually is, merely to obtain the business and transmit the proposal to the company for its acceptance. But the question as to how far the company is bound by the acts of its agent will depend upon the powers in which it has vested him. If, *e.g.*, he is provided with a book of instructions which empowers him to grant cover on behalf of the company under certain circumstances, the company could not repudiate the agent's action so long as he did not go beyond his instructions. Thus, if a loss occurred after the agent had granted cover as authorised by his instructions to do, and before the company could intimate declinature, the company could not deny liability. But even where no express authority had been given to the agent to grant cover, the company may be estopped by its conduct from repudiating liability in the event of loss where the agent had given cover. Thus, if it was customary for the agent when forwarding proposals to intimate that he had granted cover, and the company raised no objections to this, it would have no strong case for repudiating liability if a fire happened when the risk was running under the protection of the

agent's cover, for the agent in that case would have implied authority to grant cover on behalf of the company. This point was raised in the action *Murfitt* v. *Royal Insurance Co.* (1922), where an agent had given verbal cover, and before the company could intimate declinature of the proposal a fire occurred. The company sought to repudiate liability on the ground that the agent had no authority to grant cover. The Judge, however (Mr Justice M'Cardie), gave it as his opinion that the agent had *implied* authority, seeing that he had habitually for two years previously and to the knowledge of the company been granting verbal cover. Judgment, therefore, was given against the company.

In whatever way the proposal is made, *i.e.*, whether by a completed proposal form or by correspondence, or merely by word of mouth, it is the duty of the proposer to inform the company of every fact and circumstance materially affecting the risk, and if a proposal form is used the answers given to the questions asked in the form must be true. If not, if a wrong or misleading answer has been given, or if anything is misrepresented or concealed, or not disclosed, the contract would be void against the insured.[1] If the proposer signs a proposal form, notwithstanding that it has been filled up for him by the company's agent, he is still responsible for the truth of the statements it contains. He cannot plead in defence that the questions were answered by the agent himself. If

[1] See supra, chap. v.

he signs the proposal form, he is held to have satisfied himself that the questions were correctly answered. This was the decision in the case *Biggar* v. *Rock Life Assurance Co.* (1902), where the agent filled up the proposal for the proposer, who signed it without reading the answers, and was not aware that some of the answers given by the agent were false. The court held that the policy was void against the insured, whose duty it was to satisfy himself as to the correctness of the answers before signing the proposal, and in filling up the form the agent was acting as agent for the insured. In a recent case (*National Playhouses, Ltd.*, v. *Motor Union Insurance Co.* (1922)) where a false answer had been given to the question in the proposal form as to whether the insurance had been previously declined, the Judge held that it mattered not who filled in the answer to the question: the insured having signed the proposal, they alone were responsible. Where an insurance is arranged by an agent or broker acting on behalf of the insured, the insured is responsible for any statements or representations made by the agent or broker, whether he was aware of them or not. It would appear, however, that if the agent *of his own accord* supplies the company with a description of the risk, the insured is not answerable if the description given by the agent is wrong in any material particular, for in that case the agent would be acting for the company; but notwithstanding this, the insured is still answerable for a breach of any warranty appearing in the policy as

the result of the agent's statement. This is as it was decided in *Bancroft* v. *Heath* (1900).

When a proposal is made, unless it is one the company cannot accept, and, consequently, declines forthwith, it is customary to grant temporary cover pending the issue of the policy. This may be done either by letter, which states that the risk is held covered, or by the issue of a covering note, in which is set out the main heads of the proposed insurance—the name of the insured, the sum insured, and the property covered. The cover thus granted, although provisional, is binding while it lasts, so that should a fire occur during the currency of the provisional cover, the company would be liable to the insured for the loss sustained. It is for that purpose the provisional cover is granted. But the issue of a covering note does not necessarily signify that the company has accepted the proposal. The cover which has been provisionally granted is an independent contract of insurance, temporary in nature, and is intended to afford the insured the necessary protection against loss until a policy has been issued, or until the company has decided whether it can issue a policy or not. The company is not precluded from cancelling the cover and declining to proceed with the contract if further particulars in regard to the risk reveal it to be one it cannot accept. The covering note provides for this when it states that the risk is held covered until the policy is issued, unless previous intimation is given that the proposal is declined, with, in most cases, the further stipula-

tion that the covering note remains in force only for a stated number of days from the date of issue —what is known as the *time limit*. The covering note, therefore, is a provisional contract of insurance, its function being to provide the insured with temporary protection until a policy has been issued, the company reserving the right to cancel the cover if it does not wish to proceed further with the proposed insurance, and invariably the temporary cover thus granted is subject to the conditions of the company's policies. Sometimes the policy conditions are printed on the covering note, but this is not universal in practice. As, however, the insured accepts the covering note with that proviso in it, presumably he is bound by the policy conditions whether they are engrossed on the covering note or not. If the completed contract is to be subject to any special provision—not forming one of the usual conditions of the policy,—the covering note should state that the provisional contract is subject to the same provision. If, *e.g.*, the policy is to be an average one, the covering note should be average also; otherwise, if a loss occurred during the currency of the covering note, the company would not be entitled to adjust the claim under average, since the provisional contract made no reference to average. But if there is another covering note in force issued by a co-insuring office, subject to average, the policy condition providing for the importation of average from a subsisting average policy[1] should operate in the case of the covering notes also, seeing they are made subject

[1] See supra, chap. vii.

to the policy conditions. Although the duration of the covering note is restricted by the time limit, it does not follow that it remains in force until the time limit has expired; the company can cancel it before that if it finds it necessary to do so, and as a detail of practice, if it is intended that the covering note should continue in force after the expiry of the time limit—as would be the case where the proposal has been accepted, but delay had taken place in issuing the policy,—the covering note should be renewed on the expiration of the time limit, or the time limit deleted. Frequently, when there is likely to be delay in issuing the policy, the company is asked to delete the time limit so that the covering note will remain in force until a policy has been issued, unless the risk has been declined in the interval. As the covering note is only a provisional contract of insurance intended at a later date to be replaced by a properly stamped policy, the covering note itself need not, it would appear, be stamped. If, however, the contract is not consummated by the issue of a policy and a premium is charged for the time the provisional insurance was in force, a stamp is necessary in terms of section 100 of the Stamp Act, 1891 (54 & 55 Vict., chap. 39).[1]

In marine insurance the offer of a risk is accepted by the underwriter initialling a "slip" for the

[1] "Every person who (1) receives, or takes credit for, any premium for any insurance other than sea, and does not within one month thereafter make out and execute a duly stamped policy; or (2) makes, executes, or delivers out, or pays, or allows in account, or agrees to pay or allow in account, any money in respect of any policy not duly stamped, shall incur a fine of £20."

amount he accepts, or by the issue of what is called an "insurance note," which is equivalent to the fire covering note; but neither the initialled slip nor the insurance note is anything more than a provisional agreement, or honourable understanding, to issue a stamped policy on certain terms and conditions, and is not considered at law a binding contract,[1] although in practice it is regarded as such. It cannot be sued upon as a contract, for by the provisions of the Stamp Act, 1891, "A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance." In fire insurance, on the other hand, a clear acceptance of the proposal forms a binding contract, even although no premium has been paid, and whether a policy is issued or not.[2] This is well illustrated in an action on a fire insurance placed with "Lloyd's" over goods in New Zealand. Following the marine practice, the "Lloyd's" broker sent a "slip" giving the particulars of the insurance to the underwriters, who initialled it for the amounts they were prepared to accept. No policy was issued or any premium paid before a fire occurred some months after acceptance. The claim was repudiated on the ground, *inter alia*, that there was no contract, but

[1] Section 22 of the Marine Insurance Act provides: "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act."

[2] If, however, no interim protection has been granted, and the company's liability does not commence until the premium has been paid, the contract, it would appear, is not binding.

only an honourable understanding to make a contract. The courts found for the insured, the Judge (Matthews) holding that the slip initialled by the underwriters was a binding contract.—(*Thompson* v. *Adams* (1889).)

The policy [1] is the stamped document which embodies the contract. The Marine Insurance Act requires the issue of a stamped policy before a marine insurance can be valid. There is no such statutory provision in regard to fire insurance. "In my opinion any contract of insurance comes within the word 'policy.' There is no statutory or formal document necessary to make a contract of insurance. If a contract of insurance is created by any binding means, that is a policy to all intents."—(Mr Justice Kay: *Norwich Equitable Fire Assurance Society* (1887).) In the Stamp Act, 1891, a policy of insurance is declared to be for the purposes of the Act: "Every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced" (sect. 91). The familiar policy, therefore, is not essential in order to make the contract legally binding. A stamped cover note setting forth the main heads of the contract, the risk, the duration of the cover, the premium, and the conditions, would serve the purpose of a policy; but a policy is a convenient mode of giving formal expression to the undertaking of the insurers to give indemnity for loss; and although it may not be essential to the validity of the under-

[1] From the Spanish, *poliza*, *i.e.*, a written order to pay a sum of money.

taking, the "policy" is a desirable instrument as defining the intention and purpose of the contract, and as specifying the conditions upon which its validity depends. Any action arising out of the contract, whether by the insured or the company, would be founded upon the policy as interpreting the contract.

The policy is partly printed and partly written, or typed. What is printed is general to all contracts of fire insurance, and although the forms used by the different companies are not uniform in phraseology, they are so in substance. The printed portion contains the preamble, the formal undertaking to give indemnity for loss, and the conditions. The written, or typewritten, part relates to the individual contract, and recites the name of the insured, the sum insured, the premium, and the duration of the policy—whether, *i.e.*, it ceases absolutely at the expiry of the period specified in the policy, as in the case of a short-period policy, or is capable of being renewed, as in the case of an annual policy,—with a description of the property insured sufficiently adequate to identify it. The policy when completed is signed by the insurers alone, stamped in accordance with the requirements of the Stamp Act,[1] and thus completed constitutes the contract between the com-

[1] The present stamp duty is 6d., increased in 1920 from 1d., at which figure it had remained since 1865. The stamp duty is paid by the company, but previous to 1869 a further duty of 3s. per £100 insured was charged on all fire policies in addition to the stamp duty, and this charge was paid by the insured.

In marine insurance the stamp duty on the policy is paid by the insured.

pany and the insured, binding on them both, although prepared and signed by one of them only. By accepting the policy as prepared and signed by the company, the insured adopts it as the contract between him and the company, and if he raises an action against his insurers can only sue upon the policy as expressing that contract. It may be admissible, however, to refer to something extraneous to the policy—*e.g.*, the prospectuses and other literature issued by the company—in order to elucidate some point arising out of the contract, or as evidence of what the insurers intended. Thus, if the company advertises in its prospectus that damage caused by explosion or bursting of domestic boilers is covered under a private dwelling-house policy as one of the privileges granted by such policies, that could be used to substantiate a claim notwithstanding that explosion damage is negatived by a condition of the policy without any exception in the case of an explosion of the kind referred to.

Although the forms of policy used by the different companies vary in language, the general construction follows more or less uniform lines.[1] The policy usually commences with the statement: ' *This policy of insurance witnesseth that,*" in consideration of the insured having paid the first premium shown on the policy, "*the company hereby agrees,*" and then follows the formal undertaking to indemnify the insured for loss or damage

[1] A standard policy and condition is now in use among the tariff companies.

happening to the property described in the policy to the extent of the sum insured by the policy, or if there are several items, the sum stated against each item, and all subject to the terms and conditions endorsed upon the policy, and during the period the insurance remains in force, *e.g.* :—

"This Policy of Insurance Witnesseth that, in consideration of . . . [1] (hereinafter called the Insured) having paid to the . . . Company (hereinafter called the Company) the First Premium named above for insuring the following Property," and then follows a description of the property with the sum insured stated against each of the items.

"The Company Agrees with the Insured (subject to the Terms and Conditions endorsed hereon, which are to be taken as part of the Policy) that if after payment of the Premium the Property above described, or any part thereof, shall be destroyed or damaged by Fire or Lightning, at any time between the . . . day of . . . 19 , and four o'clock in the afternoon of the . . . day of . . . 19 , or of the last day of any subsequent period in respect of which the Insured shall pay to the Company, and the Company shall accept the sum required by the Company for the renewal of this Policy, the Company will pay or make good to the Insured the value of the Property so destroyed, or the amount of such damage thereto to an amount not exceeding in respect of any item the sum set opposite thereto, and not exceeding in any case the amount of the insurable interest therein of the Insured at the time of the happening of such fire."

[1] Here the name of the insured is inserted.

The conditions are usually printed on the back of the policy, and by the express words "subject to the terms and conditions endorsed hereon, which are to be taken as part of the policy," are embodied in the contract.

If the insurance is subject to any other condition, such as a condition of average, or to a warranty, the fact that the insurance is subject to such condition or warranty is expressed in the policy; and if the condition or warranty is not engrossed in the policy as part of the written or typewritten matter, but is set out on a printed slip or memorandum, this is attached to the policy, and by express words is incorporated as a part of the contract. In the same manner, if instead of describing the property insured in the policy itself, a separate specification or schedule is used for that purpose, the specification is attached to the policy and forms part of that document. The customary phraseology used in the policy is: "On . . . all as more particularly described in the attached specification, which is to be taken and read as part of this policy." By these incorporating words anything that may be affixed to the policy becomes a part of the contract, just as if it had been engrossed in the policy; but whenever anything is attached to the policy, it must be incorporated into the contract by express words. A fire policy usually is self-contained—that is to say, all the terms and conditions of the contract are embodied in the policy itself without reference to anything extraneous. It is not necessary, however, that this

should be so, and it is sometimes the practice to make reference in the policy to another policy for a description of the property insured—viz., "all as more particularly described in the specification attached to policy No. . . . of the . . . Insurance Company"; or, "subject to the same terms, conditions, and warranties as policy No. . . . of the . . . Insurance Company." These clauses have the effect of incorporating into the policy containing them the terms and conditions of the policy to which they refer.

As has already been stated,[1] it is important that the subject-matter should be correctly and adequately described, and as the description given in the policy is in most cases made by the company from particulars furnished by the insured, it is usual to provide a warning notice on the policy asking the insured to read the policy and its conditions in order to ascertain that it is in accordance with intentions. Some companies supplement this by asking the insured, if there are other insurances over the same property, to see that the wording and terms of all the policies coincide "so that in the event of a loss delay in the settlement may be avoided." This is a wise precaution, for there is nothing more annoying both to the insured and the company than to find when a loss occurs that the several policies are not concurrent.[2] This does not infrequently happen, even in cases where the policies have all been issued by the same company.

[1] See supra, page 39.

[2] For apportionment of a loss between non-concurrent policies, see supra, page 144.

If other policies exist for the same property, it should be one of the first essentials in drafting a fire policy that all these should be uniform.

Since the contract between the company and the insured is embodied in the policy, it will be interpreted literally according as it is expressed in the policy. The contract will be construed "in the literal and natural sense of the language which the contracting parties have chosen to employ"[1] in the policy. Moreover, as the written part is particular to the individual case, the printed portion being general to all contracts of fire insurance, it follows that if what is written varies or contradicts what is printed, the former will be held to prevail over the latter. For this reason it is necessary that nothing should be introduced into the written part of the policy inconsistent with any of the essential principles of the contract, and if any expression is used that is capable of a double meaning, the one more favourable to the insured will be taken. There should be no ambiguity in any part of the policy, and all loose or vague terms and phrases avoided. The description of the subject-matter should be clear and explicit, sufficient to identify the property without being burdened with needless details.

Fire insurance contracts are terminable contracts, terminating on the date specified in the policy. Most fire policies are taken out for a period of twelve months, and are so worded as to

[1] Lord Watson, in *Sun Fire Office* v. *Hart* (1889), speaking of a condition in the policy giving the insurer the option to terminate the policy during its currency.

make them capable of renewal at the expiry of the period.[1] These are *annual* policies, but an insurance may also be effected for any shorter period—what is known as a *short-period* insurance. This form of policy is most commonly met with in the case of mercantile risks. A policy which is made out for twelve months, but expires absolutely at the end of the term without any provision for renewal, is also known as a short-period policy, as distinguished from an annual policy, which is capable of renewal from year to year. Short-period policies, whether for twelve months or less, are replaced by new policies if the insurance is still required for a further period, but no days of grace are allowed under such policies. Occasionally a policy may be issued for a term of two, three, four, five, or more years—these are called *long-term* policies,—but such policies are exceptional. A rate is usually quoted on the basis of a twelve-months' insurance. If the contract is for a shorter period, the rate is a proportionate part of the twelve months' charge, with, perhaps, something added. In the case of long-term policies a discount is allowed off the *annual* premium, the discount varying according to the length of the period. The premium on long-term policies is paid in one amount at the commencement of the insurance.[2]

[1] See infra, page 233.

[2] Long-term policies of this description should be distinguished from the long-term policies which are common on the Continent. Although the latter policies are taken out for a period of years—usually ten—the premium is paid *annually*, and if the insured fails to pay the premium the company may raise an action to enforce payment.

Annual contracts are renewed by the issue of a renewal receipt on payment of the renewal premium, thus obviating the necessity of issuing a new policy. The policy itself makes provision for renewal in this way, for the undertaking is that "if . . . the Property above described, or any part thereof, shall be destroyed or damaged by Fire or Lightning at any time between the . . . day of . . . 19 , and four o'clock in the afternoon of the . . . day of . . . 19 , *or of the last day of any subsequent period in respect of which the Insured shall pay to the Company, and the Company shall accept the sum required by the Company for the renewal of this Policy*, the Company will pay . . . &c."[1] But it is important to note that the contract as expressed in the policy when originally issued, or as amended by subsequent endorsements, applies with equal force and effect throughout each renewal period, for when the renewal premium is paid a new contract is made. If, therefore, the insurance at the commencement of the contract, or at some later date, was made subject to any stipulation or warranty or condition, it continues to be so for each renewal period, unless otherwise provided for by endorsement on the policy, and a breach of any such stipulation or warranty or condition if made *at any time* will avoid the contract.[2]

[1] See supra, page 228.

[2] See, however, supra, page 163, for a modification of this rule in the case of a breach of a warranty made during a previous renewal period.

Annual policies for the sake of convenience are made renewable on stated quarter, or term, days. In England there are four such renewal periods :—

Ladyday	25th March.
Midsummer . . .	24th June.
Michaelmas . . .	29th September.
Christmas . . .	25th December.

And in Scotland there are eight :—

Candlemas . . .	2nd February.
Ladyday	25th March.
Whitsunday . . .	15th May.
Midsummer . . .	24th June.
Lammas	1st August.
Michaelmas . . .	29th September.
Martinmas . . .	11th November.
Christmas	25th December

The principal renewal dates in England are Midsummer and Michaelmas, and in Scotland, Whitsunday and Martinmas.

In the case of annual contracts fifteen days, known as *days of grace*, are allowed in which to pay the premium required for the renewal of the policy. This is a recognised custom established by use and wont in fire insurance practice, but it should be borne in mind that the concession relates only to payment of the premium. It assumes that the insured intends to renew the policy, and that being so, it is sufficient if the renewal premium is paid within fifteen days after the renewal date. Failure to pay the renewal premium promptly does not for that reason alone terminate the contract, and should a loss occur during the days of grace

and before the renewal premium is paid, it is unlikely that the company would plead non-payment of the premium as an excuse for repudiating liability. The practice of the companies has accustomed the insured to expect this indulgence in the matter of paying the renewal premium, and so long as the company is satisfied that it was the insured's intention to renew the policy, and that the premium would have been paid within the days of grace, there will be no question of repudiating liability for any claim that may arise during the days of grace. If, however, the renewal premium is not paid by the end of the fifteen days, no liability can attach under the policy which would then have lapsed through non-payment of the premium. The days of grace are conceded only for payment of the premium required for the renewal of the policy, and when the premium is paid within the fifteen days, the policy is renewed not from the date on which the premium is paid, but from the expiry date of the preceding period. In other words, the days of grace do not give the insured fifteen days' free insurance.

As has already been mentioned, a fire policy, unlike a life policy, only runs for the term specified in the policy, with, in the case of annual contracts, an option to renew.[1] There is no obligation

[1] In marine insurance a policy is either a *time* policy—running for a specified period and renewed at the end of the period by the issue of a new policy ; or a *voyage* policy—taken out for the duration of the voyage, on the termination of which the insurance ceases. A life policy assures the payment of a stated sum of money at death or at a specified date in return for an agreed annual

on either the company or the insured to continue the insurance if either of them chooses to cancel it, unless the policy contains some provision to the contrary, as, *e.g.*, where there is an agreement by the insured to continue the insurance for a stated number of years. The usual procedure is for the company to issue a renewal notice reminding the insured that his policy falls due on a certain date, and that for his own security the premium should be paid then or within fifteen days thereafter; but if the insured does not wish to renew the policy, he is under no obligation to do so. The company or the insured may either of them terminate the insurance if they so desire, in which event the policy will cease on the expiry date, no days of grace being allowed.

The company may increase the premium at renewal if it considers a higher premium is required for the risk, and if the insured refuses to pay the increased premium the insurance will terminate. If the company declines to renew the policy it need not give any reason for doing so, but once it has accepted the renewal premium, it cannot act capriciously and seek to cancel the insurance before its full term has run, unless the insured consents to the cancelment. A fire policy does not generally contain any cancellation condition, except foreign policies, where provision is made whereby the policy can be cancelled during its currency,

premium, and so long as the annual premium is paid the insurance continues until the time for payment of the sum assured is attained.

either by the insured or the company.[1] Usually if a fire policy is cancelled before its term has expired there is some particular reason for it, either because the policy is replaced by a new one, or because the insurance is no longer required, the insured's interest in the property having ceased. In the latter case the company may be asked to cancel the insurance and allow a return of premium[2] for the unexpired period of the policy; but when a policy is cancelled during its currency, it must be with the consent of both parties. Nor can the company increase the premium during the currency of the insurance unless, owing to some alteration in the risk, the fire hazard has been increased, in which event either must the increased rate be paid, or the contract avoided owing to an alteration having been made on the risk without the company's consent,[3] for consent to the alteration would in that case take the form of a demand for an increased rate. The company, however, cannot during the currency of the policy demand an additional premium merely because it has discovered that the premium

[1] The condition may be in the following terms: "The insurance may be terminated at any time at the request of the insured, in which case the company will retain the customary short period rate for the time the policy has been in force. The insurance may also at any time be terminated at the option of the company, on notice to that effect being given to the insured, in which case the company shall be liable to repay on demand a ratable proportion of the premium for the unexpired term from the date of the cancelment."

[2] See infra, page 242, for apportionment of premium.

[3] See supra, page 89.

which had been paid is inadequate. It is the company who fixes the premium, and it cannot repudiate the contract simply because it has not charged enough. Its only remedy is to refuse to renew the contract unless a higher premium is paid.

The *premium* is the consideration paid to the insurers in return for the indemnity provided by the policy, and until the premium is ascertained and agreed the contract is not complete, for a premium, or consideration—*i.e.*, something given in return,—is an essential requisite to any valid contract.

A contract of fire insurance is none the less binding, notwithstanding that no premium may have been paid, so long as the premium has been agreed upon. "It is impossible to assent to the doctrine that without a delivered policy there is no insurance. If the premium in this case had been agreed on, the insurance would have been effected, although no policy was delivered; but the premises here cannot be held to have been insured, the premium never having been determined on, and never having been fixed."—(Lord Justice-Clerk Boyle: *Christie* v. *North British Insurance Co.* (1825).)

A proposal may be offered and accepted without any reference to the premium to be charged—what is called a "firm order." The contract thus made is binding on both parties, equally as if the premium had been agreed at the time the proposal was made. In neither case—whether the proposal

is a "firm order," or whether the premium has been previously adjusted—can either party unwarrantably repudiate the contract—the company by refusing to accept the premium when proffered to it, or the insured by refusing to pay the premium when called upon to do so—without penalty of an action for breach of contract. If, however, it is made a condition of the contract that no liability attaches to the company until the premium is paid, then until the insured has fulfilled the condition the contract does not commence. Although a contract has been arranged, it is not yet complete: something requires to be done by the insured to make it binding on the company; [1] but in the absence of any stipulation of this nature the company's liability will commence from the date it definitely accepts the proposal, whether the premium has been paid or not; and if the policy is issued to the insured without payment of the premium, the company may be held to have given credit for the premium, and be liable in the event of a loss arising before the premium has actually been paid. "If the insurance company delivers a policy without requiring immediate payment of the premium, they incur responsibility for the risk, because having delivered the policy, they are held to have given credit for the premium."—(Lord

[1] A stipulation which makes the payment of the premium a condition precedent to liability is not waived by the issue of a covering note, since the covering note is an independent contract, and comes to an end when the policy is issued and payment of the premium demanded.

M'Laren: *M'Elroy* v. *London Assurance Co.* (1897).) This, of course, is quite a usual procedure where the insured is himself the agent, the premium being debited against him in the company's books.

Sometimes a *provisional* contract is arranged pending adjustment of the premium—*i.e.*, until the company has had an opportunity of examining the premises and determining what premium it will require for the risk. In a case of this description, there is no completed contract and no binding agreement, either on the part of the company to issue a policy, or on the part of the insured to pay the premium required for the proposed insurance. The offer of the insurance is conditional upon the premium being satisfactory to the insured and the company granted temporary cover on that footing. If the insured declines to accept the company's terms the provisional contract will terminate, but the company will be entitled to a premium for the period it held the risk provisionally covered.

The undertaking of the company to indemnify for loss is "in consideration" of the insured having paid the premium required for the insurance. The policy reads to the effect that in consideration of the insured *paying the premium*, or *having paid the premium*, named in the policy, and *after having paid the premium*, or *after payment of the premium*,[1]

[1] The wording, however, is not uniform in all fire policies. The standard policy reads ". . . if after payment of the premium the property insured . . . be destroyed or damaged . . . at any time before 4 o'clock in the afternoon of the last day of the period of insurance named in the said schedule . . .," and the schedule gives the period of insurance as from one specified date to another.

suffers loss between the dates specified in the policy as the dates on which the insurance commences and expires respectively, the company will make good the loss. This apparently is not to be construed as meaning that no liability attaches under the policy until the insured has actually paid the premium, or that the company is only liable for a loss that happens *after the premium has been paid.* The recital in the policy, which is in common form applicable to all contracts of fire insurance, merely expresses the intention of the parties—viz., that on the one hand the duties which the company undertakes to perform are in return for the premium which the insured on the other hand in making the contract with the company has undertaken to pay. Although the contract is binding as soon as the proposal is accepted, notwithstanding that no premium may have been paid or demanded, the company in the event of loss could delay performance of the contract until the insured had paid the premium, although it could not repudiate liability unless the policy contained a stipulation making payment of the premium a condition precedent to liability.[1] The duration of the contract is usually stated in the policy as between one specified date and another;

[1] A stipulation of this nature is not waived by the recital in the preamble of the policy, even where the policy, if not under seal, is completed and delivered to the insured. This is as it was decided in the case *Equitable Fire and Accident Office* v. *The Ching Wo Hong* (1907). If the policy is executed under seal a different rule may apply, and the company may be estopped by the recital from relying upon the condition.

and unless the premium is paid in whole or in part at the time the proposal was made, in most cases the commencing date will be antecedent to the payment of the premium, seeing that as a rule it is not until the policy is prepared and ready to be despatched that the insured is asked for payment of the premium. Where the insurance is through an agent, the policy is sent to the agent to be handed over to the insured in exchange for the premium, and in direct cases—*i.e.*, where the insurance is arranged direct with the company—the letter to the insured asking payment of the premium usually states that the policy has been prepared and will be sent to him on receipt of the first premium.

Payment of the premium, of course, puts the company definitely " on the risk," and this whether payment is made direct to the company or through an accredited agent empowered to receive payment on behalf of the company; and once the risk has attached, the insured is not entitled to claim any return of the premium paid should the risk terminate sooner than was contemplated when the insurance was effected, or should the policy for any other reason cease to be a valid contract no longer enforceable against the company. " Another rule is that if that risk of the contract of indemnity has once commenced there shall be no apportionment or return of premium afterwards. For though the premium is estimated and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be

only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned."—(Lord Mansfield: *Tyrie* v. *Fletcher* (1777).) Applying this to fire insurance, if the company becomes liable under its contract "the risk is run." It may be called upon to pay a total loss within twenty-four hours after it has accepted liability, and the premium which has been paid, or which the insured has agreed to pay, is the consideration for the risk for which the company has undertaken to be liable in the event of loss at any time during the currency of the policy. Fire insurance premiums, however, are calculated on a basis of twelve months, and, with a few exceptions, it is the practice to charge lower premiums where the insurance is for a shorter period than a year. Consequently, although the company may be entitled to retain the whole of the premium notwithstanding anything that may transpire at a subsequent date to relieve it of future liability, it is usual, where a policy is cancelled before its term has expired—either because there is no further need for the insurance, or because for some other reason the company's liability is either extinguished or reduced—to allow an appropriate return of premium for the unexpired term of the policy. The premium charged for the period during which the policy was in force is the premium which would have been charged had the policy in the first instance been taken out for that period, and the difference between that and what was originally paid represents

the amount of premium to be returned to the insured. If, however, the policy is cancelled through caprice on the part of the insured, or because he finds he can make a contract on more favourable terms with some other company, the company might be justified in refusing to return any part of the premium, unless there is a cancellation condition in the policy. Where, however, the risk has never attached—*i.e.*, where the contract has been void *ab initio*,—and consequently no liability has been incurred by the company, the insured may claim a return of the premium paid, except when the policy has been avoided through fraud on the part of the insured, and unless, as is sometimes the case, the policy contains a condition that in all cases where the policy is void or ceases to be in force all moneys paid to the company are forfeited.[1]

[1] See supra, page 164.

CHAPTER XII.

THE CONDITIONS OF AVERAGE.

AVERAGE is used in marine insurance in the sense of distributing an expense or sacrifice—known as a "general average loss"—made for the common safety of the ship and cargo over the several interests for whose benefit it was incurred, each contributing in proportion to the value of his interest —what is called a "general average contribution."[1] The same idea of distribution is denoted in the principle of average as applied to fire insurance, for under certain circumstances the loss is distributed between the insured and his insurers in proportion to their relative interests in the property. The insurers have an interest to the extent of the amount for which they are liable in the event of

[1] "There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

"Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution."—(Marine Insurance Act, 1906, sect. 66 (2) and (3).)

a fire, while the insured has an interest to the extent of the amount of his under-insurance, and each contributes to the loss in proportion to these respective interests. There is, however, a characteristic difference between average as applied to marine insurance and average as applied to fire insurance. In marine insurance all the interests concerned are, to borrow the language of the Marine Insurance Act, "imperilled in the common adventure," and whatever sacrifice is made or expense incurred to secure the safety of the property exposed to the common peril is a charge against those interests for whose benefit the sacrifice or expense was made or incurred. Average as applied to fire insurance is based on a principle of equity, and requires an insured who is under-insured—*i.e.*, insured for a part only of the value—to bear a share of the loss proportionate to his under-insurance. If an insured elects to carry a part of his risk himself, the natural corollary should be that he ought also to carry a proportionate share of any loss.

The application of average to a policy of fire insurance affects the company's liability under the policy, and limits the amount which the insured can recover. If the policy is a non-average one—and fire policies are of that description unless expressly declared to be otherwise[1]—the insured is entitled to a full indemnity for his loss up to the sum insured; the fact of his being under-

[1] And unless, of course, average is imported from a subsisting policy subject to average. See supra, chap. vii.

insured has no effect on his claim. If, however, the policy is subject to a condition of average, the relation which the sum insured bears to the value of the property at the time of the fire will be taken into account in determining the extent of the company's liability, and the insured may be called upon to contribute to the loss according to the terms of the average condition appearing on his policy.

By an Act passed in 1828 (9 Geo. IV., chap. 13, ss. 1 and 3) it was forbidden to insure in one sum two or more separate and distinct buildings, or the contents of them. A separate sum was required to be placed on each, or failing that, the insurance made subject to "the usual condition or conditions of average in use among offices for the time being,"[1] showing that the principle of

[1] The Act provided that in every case where any insurance from loss or damage by fire shall be made or renewed or continued upon two or more detached buildings, or upon two or more buildings so separated from each other as to occasion a plurality of risks, or upon any goods, wares, merchandise, or other moveable property contained in two or more such buildings as above described, or lying or being in two or more places so separated from each other as to occasion a plurality of risks (except the implements and stock upon any one farm), then, and in any of the cases aforesaid, every such separate building shall be separately valued, and a distinct and separate sum shall be insured thereon, and in like manner at least one distinct and separate sum shall be insured upon the goods, wares, merchandise, or other moveable property contained in every such separate building, or lying or being in every such separate place as aforesaid; and it shall not be lawful to insure one gross sum upon two or more such separate subjects or parcels of risk as aforesaid taken collectively, unless such insurance be declared in the policy to be subject to, and there be inserted in the policy, the usual condition or conditions of average in use among offices for the time being.

average was at that time recognised in fire insurance practice. The Act, which had nothing to do with fire insurance procedure, but was intended to prevent evasion of the percentage duties which at that time were imposed on fire policies, was repealed during the reign of Queen Victoria (32 & 33 Vict., chap. 14); but the principle it enunciated was retained by the companies, and it is now a maxim in fire insurance practice, although no longer made compulsory by law, that all insurances of the description referred to in the Act—what are known as *floating insurances*—shall be subject to average.

The effect of the application of average to a floating insurance is that the insured is required to insure for the full value of the whole property included within the range of the floater, or be content with a partial indemnity only, thus:—

Risk.	Values.	Floating insurance subject to average.	Loss.
I.	£100		£50
II.	£150	£250	...
III.	£200		...
	£450		

As the total insurance is £250 against an aggregate value in the three risks of £450, the company by the operation of average is liable for the loss in I. in the proportion of $\frac{250}{450}$. It is not sufficient that the sum insured should be equal to the greatest value contained in any one risk. Unless the insur-

ance equals the total values contained in *all* the risks average operates, and the company's liability for any loss arising in any one of the risks is restricted to the proportion which the sum insured bears to the total values. It is extremely unlikely that a fire will break out simultaneously at two or more places; nor, if they are sufficiently far apart, need a fire in one of them affect any of the others. Consequently, if average were not applied, the insured might consider that if he insured only for an amount equivalent to the largest value contained in any one place, that would be sufficient, for at whatever place a fire did occur he would have enough insurance to cover his loss there. With average applied, however, unless the insured is prepared to bear a share of the loss himself, he must insure for the full value contained in all the places embraced by the floater.

But although average was applied originally only to "floating" insurances, the tendency of modern practice is to apply average to *specific* insurance also—*i.e.*, to an insurance relating to one building, or the contents of it [1]—for certain classes of trade risks, and also where special discounts are allowed either on account of the building being of fire-resisting construction, or because it is protected with an installation of automatic sprinklers. The rates charged for some of these

[1] Or to two or more buildings (or the contents of such buildings) so related to one another as to form what is technically called "one risk," in contradistinction to a floating insurance which embraces a *plurality* of risks.

trade risks are heavy, and the insured might plead that as an excuse for not maintaining a full insurance; or where the building is of superior construction, or provided with efficient fire-fighting appliances, he might argue that his immunity from a serious loss makes a full insurance unnecessary. The effect of the application of average, however, is that unless the insured has insured to the full extent—or to the limit required by the particular average condition applicable—he becomes liable for a proportion of the loss himself. In other words, average prevents a selection against the company whereby the company would incur a maximum liability for a minimum premium return.

It is a characteristic of fire insurance that the insured is not required to contribute any share of the loss so long as he has sufficient insurance to cover it, but that is varied by the application of the principle of average. An insured may effect an insurance for, say, 75 per cent only of the value, and yet the company would be liable under a non-average policy for the whole of any loss up to that limit. Although the insured has elected to carry 25 per cent of the risk himself, so long as the loss did not exceed the amount of his insurance he would be fully covered, and it would only be in the event of the *total* destruction of the property that he would require to bear any part of the loss himself. Under such circumstances the company, although not receiving premium for the whole value exposed to the risk of loss, would nevertheless be liable to pay the whole of any loss that did

not exceed the sum insured. Average adjusts this somewhat anomalous situation, and at the same time brings about a more equitable distribution of the loss by making the insured and the insurer contribute according to the extent to which their respective interests would be prejudiced by the total destruction of the property.

The theory of insurance is the distribution of the individual loss. This is translated into practice by distributing the loss which a fire brings about among those who are exposed to the risk of the same loss, the ratio of contribution being based on the amount which each contributor is likely to lose, measured by the amount of his insurance.[1] Thus, each householder contributes to the loss which another householder suffers in proportion to the amount for which each is insured; but if some of them have not insured to the full extent of their potential loss—that is to say, if some of them are under-insured,—they will contribute proportionately less than those who are fully insured. If, for example, A, B, and C each possess a house valued at £1000, and A insures for £1000, B for £750, and C for £500, and A suffers a loss of £100. although each is exposed to the risk of suffering the same loss, they do not contribute to A's loss equally. B and C contribute on the basis of £750 and £500 respectively, while A contributes on the basis of £1000. The application of average would adjust this inequality, for then B and C would either require to insure for the full value—in which

[1] See supra, page 9.

event all would contribute equally,—or be content with a partial indemnity only, which would mean that in the event of either B or C suffering a loss A would contribute to a part only of the loss.

The application of average to fire insurance may have the not unlikely result also of reducing the loss ratio. This may be brought about either through an increase in the premium yield owing to increased insurances from the application of average, or by a reduction in the amount paid in claims owing to part of the loss being thrown upon the insured by the operation of average; or if it happened that by the application of average both premiums and losses were increased, the ratio of losses to premiums may still be lower than would be the case in the absence of average: for every fire does not necessarily produce a total loss, meaning thereby that the building with its contents is wholly destroyed. Consequently, if the insurance is a full one, there is bound to be a certain proportion of the premium saved. On the other hand, if there is not a full insurance the loss under the policy might easily be total, for although the damage is only partial the sum insured will be exhausted, and there will be no reserve of premium, represented by the values unaffected by the fire. It is this reserve of premium which goes to reduce the loss ratio, and whatever reduces the loss ratio reduces the cost price of fire insurance. This, as is noted in another chapter, is reflected on the selling price,[1] and the logical inference, therefore,

[1] See *infra*, chap. xiv.

would seem to be that if the application of average to fire insurance brings about a reduction in the ratio of losses to premiums, fire insurance protection will be sold cheaper than would otherwise be possible, for if it costs less to provide fire insurance protection, it will cost less to purchase it. It could be argued, of course, that if the application of average resulted in a reduction of the selling price of fire insurance, the loss ratio would increase, since a reduction in the selling price would not diminish the amount paid in fire claims, and the position therefore would be no better than without the principle of average. But while that may be so, if the application of average to fire insurance lowered the selling price of fire insurance protection and so increased the purchasing power of fire insurance premiums, an insurer could then purchase a full indemnity with the same premium which formerly provided a *partial* indemnity only, and such a result obviously would be to the advantage of the insuring public.

The average conditions in common use are the *Pro Rata Condition*, the *Special Condition*, and the *Two Conditions*.

1. The *Pro Rata Condition of Average*, or full average,[1] is usually applied to insurances covering

[1] The *Pro Rata* Condition of Average, which has been in use in its present form since 1882, is in the following terms:—

"Whenever a sum insured is declared to be Subject to Average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the Insured shall be considered as being his own Insurer for the difference, and shall bear a ratable share of the loss accordingly."

a plurality of risks—otherwise "floating" insurances,—and also to certain "specific" insurances where it is considered desirable to apply the principle of average.[1] The *Pro Rata* Condition requires that the sum insured shall represent the full value of the "property covered thereby," otherwise in the event of a loss the insured would rank as his own insurer for the difference between the sum insured and the full value of the property insured at the time of the fire, and contribute to any loss accordingly, *e.g.* :—

Total value .	. £500	
Sum insured	. 300	
Difference	. £200	being the amount for which the insured is his own insurer.

Loss £100, allocated:

To Company on	£300	=	$\frac{3}{5}$ths
To insured on	200	=	$\frac{2}{5}$ths
	£500	=	$\frac{5}{5}$ths

The insured by the operation of average contributes to the loss according to the value of his uninsured interest in the property; to that extent —namely, the uninsured value—he is his own insurer, and as such bears a ratable proportion of the loss. The values, however, are those existing at the time of the fire, not those when the insurance was first effected. Although prior to the fire the insured may have been under-insured, that would not affect his claim if at the time of the fire the property was fully covered.

2. The *Special Condition of Average*, or Three-

[1] See supra, page 249.

fourths Condition,[1] operates in the same manner as the *Pro Rata* Condition, except that instead of requiring a full insurance, as in the case of the *Pro Rata* Condition, the Special Condition asks that the sum insured shall represent *at least* three-fourths of the value, failing which, average would operate precisely in the same manner as the *Pro Rata* Condition of Average, *e.g.* :—

(*a*) Total value . . £800 Loss . . £100

Sum insured . . £500

Proportion of sum insured to value = $\frac{5}{8}$ths.

Since the sum insured is less than $\frac{3}{4}$ths of the value, the loss is allocated under average :

To company = $\frac{5}{8}$ths
To insured = $\frac{3}{8}$ths.

(*b*) Total value . . £800 Loss . . £100

Sum insured . . £600

Proportion of sum insured to value = $\frac{6}{8}$ths ($\frac{3}{4}$ths).

As the sum insured is not less than $\frac{3}{4}$ths of the value average does not operate, and the company bears the whole of the loss.

It should be noted that when the Three-fourths Average Condition, or any other condition of a similar nature, operates—that is to say, when the

[1] The *Three-fourths* Condition of Average reads as follows :—

"When a sum insured is declared to be subject to the Special Condition of Average, then, if such sum shall at the breaking out of any fire be less than three-fourths of the value of the property insured in that amount, the Insured shall be considered as being his own Insurer for the difference between the sum insured and the full value of the property insured at the time of the fire, and shall bear a ratable share of the loss accordingly."

sum insured is not up to the limit required by the Special Condition of Average—it operates precisely in the same manner as the *Pro Rata* Condition. So long, however, as the sum insured under a policy which is subject to the Special Condition of Average is equal to three-fourths of the value—or whatever proportion is required by the particular condition of average to which the policy is subject,[1]—the Special Condition does not operate, and the insured recovers the full amount of his loss up to the sum insured. Thus, if the loss in example (*b*) above had been £600, the company would have been liable for the entire loss.

3. The *Two Conditions of Average*,[2] like the *Pro Rata* Condition, are used where the policy covers a plurality of risks, but a policy which is subject to the Two Conditions does not contribute to the

[1] The average condition, *e.g.*, may be the 80 per cent condition, in which case the sum insured would require to represent 80 per cent of the value in order to avoid the operation of average.

[2] The Two Conditions of Average—adopted by the companies in their present form in 1882—are as follows :—

"1. Whenever a sum insured is declared to be Subject to Average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the Insured shall be considered as being his own Insurer for the difference, and shall bear a ratable share of the loss accordingly.

"2. But if any of the property included in such Average shall, at the breaking out of any fire, be also covered by any other more Specific Insurance, *i.e.*, by an Insurance which at the time of such fire applies to part only of the Property actually at risk and protected by this insurance, and to no other Property whatsoever, then this Policy shall not insure the same except only as regards any excess of value beyond the amount of such more Specific Insurance or Insurances, which said excess is declared to be under the protection of this policy and Subject to Average as aforesaid."

loss until whatever more specific policies that may be in existence at the time of the fire—*i.e.*, policies covering a part only of the property covered by the Two Conditions of Average policy—have paid to the full extent of their liability. Thus, a floating insurance subject to the Two Conditions of Average may be effected over goods in, say, three warehouses, each of which is covered also by a specific policy—*i.e.*, a policy which insures a separate amount for each warehouse. In the event of a fire the specific policy would pay the loss up to the limit of its liability, and then the floating insurance would be brought in to pay any excess of loss beyond what had been paid under the specific policy, *e.g.* :—

(*a*) Risk.	Specific policy (non-average).	Floating policy. Subject to the Two Conditions.	Values at time of fire.	Loss.	Specific policy pays.
I.	£500		£750	£700	£500
II.	750	£750	1000	...	...
III.	1000		1250	...	...
	£2250	£750	£3000	£700	£500

Total value	£3000
Total of specific insurances	2250
Excess of value over specific insurances .	£750
Total loss on I.	£700
Loss covered by specific policy	500
Floating policy pays excess of loss . .	£200

Average does not operate, as the excess of value is fully covered by the floating policy.

The formula is :—

Floating policy pays—

$$\frac{\text{Sum insured}}{\text{Total value—total of specific policies}} \text{ of balance of loss.}$$[1]

It is the excess of value over what is covered by the more specific policy that is insured by a policy subject to the Two Conditions of Average, and it is that excess which is made subject to average, *e.g.* :—

(*b*) Risk	Specific policy (non-average).	Floating policy. Subject to the Two Conditions.	Values at time of fire.	Loss.
I.	£500		£500	£500
II.	750	£500	1500	...
III.	1000		1000	1000
	£2250	£500	£3000	£1500

As there is no excess of value in I. and III., the floating policy covers nothing in these risks, and consequently contributes nothing to the loss, which falls entirely on the more specific policy. If, however, there had been also a loss of, say, £1000 on II., the specific policy would pay £750 (the amount of its insurance on II.), and the balance of £250 would fall on the floating policy, but as the excess of value is £750 against £500 insured by the floating policy, that policy would be liable for the balance of loss in the proportion of $\frac{500}{750}$ or $\frac{2}{3}$rds.

[1] See, however, page 260 for a variation of this, where the sum insured by the specific policy is greater than the value.

Take another example :—

(c) Risk.	Specific policy (non-average).[1]	Floating policy. Subject to the Two Conditions.	Values at time of fire.	Loss.	Specific policy pays.
I.	£500		£600	£600	£500
II.	750	£500	1000	800	750
III.	1000		1400	1100	1000
	£2250	£500	£3000	£2500	£2250

Total value	£3000
Total of specific insurances	2250
Excess of value over specific insurances .	£750

	I.	II.	III.
Total loss	£600	£800	£1100
Loss covered by specific policy .	500	750	1000
Balance of loss to be met by floating policy	£100	£50	£100

As the excess of value is more than the amount covered by the floating policy, average operates, and the floating policy pays under average $\frac{500}{750} = \frac{2}{3}$rds of the balance of loss in I., II., and III.

In like manner, if there is a floating policy subject to the *Pro Rata* Condition of Average covering goods in two of the warehouses, the policy containing the Two Conditions of Average would stand aside until the former policy, being a "more

[1] In these examples it is assumed that average is not imported from the Two Conditions of Average policy into the specific non-average policy.

specific insurance," had contributed to the full extent of its liability, *e.g.* :—

(*d*) Risk.	A policy. Subject to the *Pro Rata* Conditions of Average.	B policy. Subject to the Two Conditions of Average.	Value.	Loss.
I. }	£1000 }		£500	£200
II. }		£1000	750	300
III.	...		750	...
		£2000	£2000	£500

A's liability under average is $\frac{1000}{1250}=\frac{4}{5}$ths of the loss in I. and II.—*i.e.*, the proportion which the sum insured by A bears to the total value in I. and II., while B is liable for the balance of the loss in the proportion of $\frac{1000}{2000-1000}$—that is, the proportion which the sum insured by B bears to the total value in I., II., and III., less the sum insured by A. Since the excess of value is fully covered, B is liable for the entire balance of the loss uncovered by A.

If, however, the loss had been wholly in III., the floating policy alone would have been liable, since it is the only insurance applying to III.

Cases may arise where the sum insured by the lesser range policy is more than the value at the time of the fire. When that happens, it is necessary for the purposes of ascertaining the amount falling under the protection of the Two Conditions of Average policy, to compare the total *liabilities* (not the total *insurances*) of the lesser range policy with the value at risk, since the liability of any

policy can never exceed the actual value at risk at the time of the fire,[1] *e.g.* :—

(c) Risk.	Specific policy (non-average).	Floating policy. Subject to the Two Conditions.	Values at time of fire.	Loss.	Specific policy pays.
I.	£500		£1000	...	...
II.	750	£500	1250	£800	£750
III.	1000		500	...	...
	£2250	£500	£2750	£800	£750

Total value	£2750
Total of specific policy *liability* (or the amount actually covered by the specific policy)[2]	1750
Excess of value over specific *liability* . .	£1000
Total loss on II.	£800
Loss covered by specific policy	750
Balance of loss to be met by floating policy	£50

Floating policy pays $\frac{500}{1000}$, or one-half, of £50.

If the formula shown at the end of example (*a*) is stated thus :—

$$\frac{\text{Amount insured by floating policy}}{\text{Total value—total of specific } \textit{liability}} \text{ of the balance of loss,}$$

we get a formula which applies throughout all these examples.

[1] See supra, page 14.

[2] *I.e.*, Sum insured in I. . . £500
Sum insured in II. . . 750
Value in III. . . 500
£1750

Although the insured is fully covered in the aggregate, he is unable to recover his full loss owing to the manner in which he has arranged his insurances.

In rating a floating policy the usual practice is to charge the rate for the most highly-rated risk embraced by the floater.[1] If warehouses I., II., and III. in example (*e*) were rated at 10s. 6d. per cent, 7s. 6d. per cent, and 5s. per cent respectively, the rate for the floating policy would be 10s. 6d. per cent. The insured, in the hope of saving premium, and relying upon the floating policy to make up any shortage in the specific policy, may keep down the specific amount on the higher rated risks and over-insure specifically on the lower. He overlooks the fact, however, that in the event of a fire in III., the specific policy would not under any circumstances pay more than £500, and consequently his attempt to save premium reacts upon himself by making him pay a share of the loss.

If policy A in example (*d*) had been subject to the Two Conditions of Average instead of the *Pro Rata*, the same result would have been produced, since the second condition does not operate unless at the time of the fire there is a lesser range policy in existence, or, to adopt the expression used in the condition, there is a "more specific insurance." Consequently, as there is no policy of lesser range, or more specific, than A, it ac-

[1] Since the whole of the floating policy's liability may apply to the most highly-rated risk.

quires no advantage from the Two Conditions of Average, and must contribute its full liability just as if policy B were non-existent, for in every case where a Two Conditions of Average policy and a lesser range policy (whether average or non-average) come together, the liability of the Two Conditions of Average policy is found according to the formula set out at the end of example (*e*) above.

It will be noticed that the second part of the Two Conditions of Average is not an average condition, but a contribution clause setting forth the manner in which the policy is to contribute towards a loss. The ordinary contribution condition of a fire policy [1] makes each policy contribute a ratable proportion of the common loss. The second part of the Two Conditions of Average modifies this, and a policy subject to that average condition does not contribute any share of the loss until such more specific policies as may exist have first been exhausted, and then only for the excess of value uncovered by such more specific policies. A policy subject to the Two Conditions of Average does not, therefore, contribute ratably along with the lesser range policies. Although this may give the wider range policy an advantage over the one of lesser range, the insured benefits by it.[2] The intention of the Two Conditions of Average was to bring about an adjustment of the loss more

[1] See supra, chapter vii.

[2] See, however, supra, page 142, for the effect of the standard policy condition which imports average from a Two Conditions of Average policy into a specific non-average policy.

equitable to the insured than under the independent liability method,[1] for in certain circumstances the independent liability method of apportionment left the insured with a part of his loss uncovered, notwithstanding that in the aggregate he was fully insured, *e.g.* :—

(*f*) Risks.	A policy.	B policy.	Value.	Loss.
I.	£1000	£1000	£1500	£300
II.	...		500	300
		£2000	£2000	£600

By the independent liability method the insured would recover his whole loss on I., but only half of his loss on II., whereas if policy B had been subject to the Two Conditions of Average, the insured would have been paid his loss in full, and that even although average were imported from B into A, for the importation of average would not prejudice the insured's rights.

Since the second part of the Two Conditions of Average defines a "more specific insurance" as one applying to a part only of the property covered by the Two Conditions of Average policy and to *no other property whatsoever*, if the "more specific policy" includes within its range any property that the Two Conditions of Average policy does not cover, it is not more specific and the second condition in consequence does not operate, the loss common to both policies being paid by them in ratable proportions, *e.g.* :—

[1] See supra, page 146.

(g) If A insures risks I., II., and III. subject to Average, and B insures risks I., III., and IV. subject to the Two Conditions of Average,

as A is not more specific than B, the latter gets no advantage from the Two Conditions of Average in the event of a loss on I. or II., but must contribute ratably along with A.

Or take the following case :—

A insures risks I. and II.
B insures risks II. and III.

Both are subject to the Two Conditions of Average, but neither of them is more specific than the other, and as each covers property which the other does not, the second part of the condition does not operate, and the loss is apportioned under the independent liability method.

Although the condition is referred to as the "Two Conditions of Average," the first part only is an average condition, the second part, as has already been stated, simply defining how the policy is to contribute when a loss arises. It is thus a contribution condition, but in a different sense from the ordinary contribution condition of a fire policy, which provides for a ratable apportionment of the common loss among all the policies covering that loss. The second part of the Two Conditions of Average is a contribution condition only in that it delays the operation of the policy until certain other policies have paid up to the full extent of their liability, and in this way it defines the particular loss the policy covers. A

Two Conditions of Average policy, therefore, insures something different from these other policies, and, consequently, cannot be expected to contribute ratably with them. It is essentially an excess insurance, for although it purports to indemnify the insured up to a certain amount in respect of the property described in the policy, its ratio of contribution in the event of a loss is not in the proportion which the sum insured bears to the total value of the property. What it actually does is to cover a certain part only of the value —viz., what is not covered by the other "more specific" policies.

The second part of the condition opens with the statement, "But if any of the property included in such average." It has been argued that as the condition is framed the second part is made dependent on the first, whereas by the rule adopted in practice it operates not only independently of the first part but prior to it, for it is only after it has been ascertained whether there are any "more specific" policies in force that the Two Conditions of Average policy is made to operate under average, as provided in the first part of the condition, for any excess of loss uncovered by the more specific policies. It is necessary in considering the Two Conditions of Average to keep two things in mind: (1) the policy is an average one; that, of course, is inevitable, seeing that the insurance is on floating terms; but—and this is the second point—since a floating policy subject to the Two Conditions of Average provides an insurance

supplementary to the ordinary specific insurances to be available in the event of these latter policies not being sufficient to meet the whole loss, the Two Conditions of Average policy never can—where there are other more specific insurances in existence—insure the whole value of the property,[1] and the full effect of the application of average is therefore modified by the second part of the condition which restricts the insurance to a part only of the value,—the excess over what is covered by the specific policies. It is to that value alone that the insurance applies, or to adopt the words of the condition, it is that value which is "under the protection of this policy" and is subject to average. So far as its position in the condition is concerned, the second part does not seem to be misplaced, and if the opening words of the second part were altered to read: "But if at the time of the happening of a loss the property hereby insured is also covered by any other more specific insurance, &c. . . ." the wording would be consistent with the method in which the condition is applied in practice.

[1] Of course, if there are no more specific insurances in force, the floating policy would be the only one insuring the property. In that event, the second part of the condition would not operate, and the policy would become a full, or *pro rata*, average policy.

CHAPTER XIII.

MORAL HAZARD IN FIRE INSURANCE.

Moral hazard is uninsurable; that may be taken as axiomatic. Not only is there no rate sufficient to meet it, but a contract such as that of fire insurance, which depends so largely on the observance of good faith by the insured, is made impossible when moral hazard is found to exist.

The simplest form of moral hazard is where the insured is prepared deliberately to cause fire. He insures, not to protect himself against a contingency which he hopes may never arise, but for the deliberate purpose of obtaining the proceeds of his policy. That risk is unratable and uninsurable. It is contrary to the whole purpose of fire insurance, which is to relieve an individual of the consequences of a misfortune he could neither avoid nor prevent. If a man sets his property on fire, that cannot be called a misfortune. There is some purpose in what he does, for he intends that the fire will benefit him, and fire insurance cannot be conducted under conditions that will make it worth a man's while deliberately to set fire to his goods

and property. Fire-raising with intent to defraud is punishable as a crime, but it is not always possible to prove that a crime has been committed, for the wrong-doer is careful not to run the risk of discovery. If a company repudiates its contract, it must show good cause for doing so; and while it may have reason to suspect its insured, it may not have sufficient evidence to prove him guilty of fraud. If, therefore, there is any doubt as to the integrity of a prospective insured, the office will avoid the risk altogether. It cannot afford to underwrite a risk where there is any suspicion of moral hazard.

Good faith is essential to a contract of fire insurance, which implies mutual confidence between both parties.[1] The contract would be impossible otherwise, for then it would assume the nature of a transaction where one party seeks to advantage himself at the expense of the other party. The insured and the insurer have a common interest in the safety of the property, for neither wishes to incur the loss that a fire would cause. It is expected also that if a fire does occur the insured will do whatever lies in his power to have it extinguished. Otherwise—if it is a matter of indifference to him whether his whole property is consumed or not—presumably he has more to gain than lose by the fire. This is contrary to the spirit of the contract, besides placing the company at a disadvantage inconsistent with the essential principle of good faith, which implies the exist-

[1] See supra, chap ii.

ence of mutual confidence between insured and insurer.

But it is not only from the dishonest acts or intentions of the insured that moral hazard arises. Carelessness or indifference on his part, as evidenced in a lack of proper supervision, bad management, or want of care in the upkeep of plant, may import the element of moral hazard into an otherwise desirable risk. Where slipshod and slovenly methods are found to exist; where discipline is lax, and practices are permitted that would not be expected or tolerated in any properly organised establishment; where the plant and general equipment are allowed to fall into disrepair from want of attention—in such circumstances it is safe to conclude that the fire hazard is increased. At all events the conditions are such as to create a prejudice against the risk, for they are apt to give the impression that the insured is careless about fire.

Moral hazard may arise in other ways—through adverse trade conditions, for example. A fire occurring during a period of prosperity would be a serious matter, for the interruption and dislocation that would ensue might involve the insured in a financial loss which he could not recover under his fire policy.[1] It is otherwise, however, during a time of trade depression, for then it might be of little consequence if a fire did occur, and the temptation to utilise his fire policy as a means of extricating himself from financial embarrassment

[1] See supra, page 33.

might be too strong for an insured, whose conscience is none too tender, to resist. Whenever conditions arise as tend to have an adverse effect on a man's trade—whether this be owing to misfortune or bad management or faulty judgment, or to unavoidable causes—there is the possibility of the fire risk being prejudiced by moral hazard.

The relations existing between employer and employee—whether, *i.e.*, these are of a friendly nature or the reverse—are also important from the point of view of moral hazard. Disaffection among the work-people, or antagonism towards their employer, may manifest themselves in acts of wilful fire-raising. A workman with a grievance, or one who has been dismissed, may, as an act of revenge, deliberately set fire to the premises—such things are not unknown. Dishonesty also on the part of some responsible official, such as a manager or others in places of trust, may introduce the element of moral hazard, for in order to conceal any irregularities of which they may have been guilty, they may set the premises on fire, as being the easiest way of destroying all traces of their defalcations.

It is not only the physical hazard of a risk that the companies have to consider; they have to take into account also the character of the persons they are insuring, and judge of the moral hazard. The human element is a factor that cannot be overlooked in a contract of this nature, for it may have the effect of converting a profitable risk into an unprofitable one. The principles which govern a fire insurance contract protect it from being used

for unlawful purposes,[1] but notwithstanding this indisputable fact, a company cannot insure a person if it has reason to believe he will put his policy to other than its proper uses, relying upon the operation of these principles to relieve it of liability when a loss arises. A risk tainted with moral hazard cannot be accepted at any price, otherwise it would amount to condoning fraud. A fire underwriter may sometimes under the stress of competition, or in his eagerness to get business, allow his zeal to run away with his judgment of the physical hazard of a risk. He is, of course, laying up trouble for himself in doing so, but it would be fatal to the ethics of his business if he deliberately ignored the moral hazard.

Nor must a company in the manner in which it conducts its business create the impression that it is careless or indifferent on the question of moral hazard. A fire policy exists for the purpose of giving an indemnity for a loss that has been incurred. No insured has a right to expect more than an indemnity, and no office has a right to give more than that. This, however, does not prevent a company from interpreting the terms of its contract broadly. It is not precluded by the principle of indemnity from making an *ex gratia* payment when the circumstances justify it, and where to withhold it would inflict an undoubted hardship on the insured;[2] nor is it precluded, when a doubt arises as to the extent of the loss, from giving the insured the benefit of the doubt.

[1] See supra, page 9.

[2] See infra, page 335.

But equity in the settling of fire claims is not necessarily synonymous with liberality. Equity will establish an office in the confidence of its insured, while liberality may only furnish an inducement to some unscrupulous individual to exploit his fire policy for his own profit and advantage.

It is not generally the practice in fire insurance, as it is with casualty business, to require a proposal form to be completed as an indispensable preliminary to the completion of the contract; nor in many cases is it necessary. Much of the fire business in this country is underwritten on verbal instructions, or from instructions received from an accredited agent in whom the company places confidence. But notwithstanding this, there are numerous instances where the completion of a proposal form is highly desirable and ought to be insisted upon, especially where the proposer is unknown to either the agent or the company. The company has a right to know something about the person who is making the proposal, and the proposal form offers the readiest means of obtaining the information. "Have you ever had a fire?" "Have you been previously insured?" "Has any office declined your insurance?"—these are some of the questions which the proposal form asks. Obviously if the office is not satisfied with the answers to these questions it will refuse the business, and if a false answer is given, the contract will be vitiated against the insured.

A fire insurance contract being essentially a

personal one, the company's consent must be obtained before a policy can be transferred from one interest to another. If the risk of moral hazard is to be eliminated from the transaction, it is necessary when interest is transferred that the company should satisfy itself as to the *bona-fides* of the new interest. This is just as necessary in the case of a transfer of interest by endorsement as with a new policy. To all intents and purposes it *is* a new contract—at all events it is a contract entered into with a new insured. Although this applies in all cases of transfer of interest, it applies particularly in the case of trade risks, especially small retail businesses, where success may depend largely on the individuality of the shopkeeper. Because a business prospered under the former proprietor does not necessarily mean that it will meet with the same success under his successor. Consequently, when a fire policy is asked to be transferred to a new interest it is just as necessary that the company should be satisfied as to the *bona-fides* of the new interest as to that of the original insured. This is a point worthy of attention in ordinary practice.

What must be borne in mind in considering this question of moral hazard is the effect it would have on the cost price of fire insurance. As is shown in a later chapter,[1] the chief item in the cost price is the amount paid away in fire losses. Consequently, unless care is exercised to eliminate the element of moral hazard from fire

[1] See infra, chap. xiv.

insurance, the cost price must inevitably rise, and to meet this the selling price would require to be raised also. Moral hazard, however, cannot be provided for in any system of rating, since the best risk—*i.e.*, one where judged from the physical standpoint the fire hazard is at its lowest—will become wholly bad when tainted with moral hazard. There is the other aspect of the question to be considered, for even if it were possible to adjust a selling price for any particular class of risk appropriate to the enhanced cost price caused by the losses attributable to moral hazard, the result would be inequitable on the general body of the insuring public, on whom must ultimately fall the losses caused by fire, since they would then be made to suffer for the dishonest acts of certain of their number by having to pay higher rates of premium for their own insurances; or to express it in another way, by having to share a loss that was not due to a misfortune or an accident. Such a condition of things would soon become intolerable, and fire insurance be regarded with obloquy as putting a premium on dishonesty. In their own interests, therefore, the companies must eschew moral hazard, for fire insurance cannot succeed without the support of the insuring public for whom it exists. For these reasons moral hazard is uninsurable, and where it is suspected, the risk is declined.

CHAPTER XIV.

1. THE COST PRICE OF FIRE INSURANCE.
2. ACCUMULATION IN FIRE RISK.
3. FIRE WASTE.

1. *The Cost Price of Fire Insurance.*—The *cost price* of a commodity—or what Adam Smith in his 'Wealth of Nations' calls the *natural* or *central* price—is the cost incurred in manufacturing it and bringing it to the market. Its chief component parts are the cost of the raw material, the wages paid for labour, the rent of land, buildings, or plant, and the profit on the labour and capital employed in producing and marketing it. Profit is essentially an item in the cost of any commodity, for, "As, while he is preparing and bringing the goods to market, he advances to his workmen their wages, or their subsistence; so he advances to himself, in the same manner, his own subsistence, which is generally suitable to the profit which he may reasonably expect from the sale of his goods. Unless they yield him this profit, therefore, they do not repay him what they may very properly be said to have really cost him." [1]

The *selling price*, or market price, of a com-

[1] 'Wealth of Nations.'

modity is the price at which it is sold. If a commodity is sold for no more than what it is worth—*i.e.*, for what it really costs the person who brings it to the market,—it is sold at its natural price. "When the price of any commodity is neither more nor less than what is sufficient to pay the rent of the land, the wages of the labour, and the profits of the stock employed in raising, preparing, and bringing it to market, according to their natural rates, the commodity is then sold for what may be called its natural price."[1] But a commodity may be sold at less than its natural price, or the price paid for it may be more than that. Whether the market price is above or below or precisely the same as the natural price will depend upon whether there are influences at work to affect the market price, whether, *e.g.*, there is a shortage of the particular commodity or the reverse,—whether, *i.e.*, the selling price is affected by the operation of the law of supply and demand,—or it may be that competition is forcing down the price; but whatever reason exists for keeping the market price suspended above the natural price or forcing it down below it, when conditions are normal the selling or market price of any commodity is governed by its natural price. "The natural price is, as it were, the central price, to which the prices of all commodities are gravitating. Different accidents may sometimes keep them suspended a good deal above it, and sometimes force them down even somewhat below it. But whatever may be the obstacle which hinders them from settling in this

[1] 'Wealth of Nations.'

centre of repose and continuance, they are constantly tending towards it."[1]

The same rules apply in principle to fire insurance, with, however, certain characteristic variations in the manner in which they are applied. The primary function of fire insurance is to give protection against loss by fire. Indemnity for loss by fire is the particular commodity which the fire insurance companies have to sell, but as in the case of any article of commerce, the price at which the protection, or indemnity, is sold must bear some relation to the cost incurred by the companies in providing it. In fire insurance as in trade and commerce, the selling price must gravitate to the cost price—"this centre of repose and continuance." The price at which a commodity can be sold is ascertained by computing the various costs incurred in producing and marketing it. Similarly with fire insurance, with this difference, however, that the selling price, or the premium, is fixed in advance, and it is not until the contract has run its full term that the companies know whether they have sold below cost or not.

This is inevitable from the nature of fire insurance, which is more or less speculative in so far as it contains the element of chance, both in regard to the happening of the event and in regard to the consequences when the event does happen. It is not known that a fire *will* occur; neither is it known, if it does occur, what loss may ensue,[2]

[1] 'Wealth of Nations.'

[2] Fire insurance differs in this respect from life assurance. It is known that a life policy will become a claim at some time or

and as the chief item in the cost price of fire insurance is the amount paid away in fire claims, it follows that in fire insurance the cost price must inevitably be an uncertain and varying quantity, fluctuating according as the loss ratio rises or falls. In trade the cost price is a known quantity, and the selling price can be adjusted to meet any variations that may take place in the cost of production, such as, *e.g.*, in the cost of the raw material or in the rate of wages. In fire insurance it is otherwise. The premium required for any single risk is fixed in advance at the commencement of the insurance, and is based, not upon any certain knowledge of what the cost of it will be to the company, but upon the collective experience of its class, and on the assumption that that experience will be no better and no worse in the future than it has been in the past; in other words, the selling price of fire insurance is based upon assumption and not upon certainty—on the assumption, *i.e.*, that the past will repeat itself in the future, and that the cost price will approximate what it has been for similar protection in the past. It is here that the element of chance comes in, for it may happen—as it has happened before—that some untoward event, or a cycle of bad fires, will falsify expectations and send the cost price soaring above its normal level. It is recognised that the cost price of fire insurance is exposed to a sudden

another, and the amount to be paid when it does become a claim is also known. A claim may never arise under a fire policy, and if it does it is not known what the extent of the claim may be—whether the total amount insured or less.

rise such as this, and to provide for it the companies accumulate substantial reserves which can be drawn upon when required to adjust the balance should the cost price in any year, owing to some unforeseen and untoward event, exceed the selling price in that year.

The amount paid in fire claims is the principal item in the cost price of fire insurance, but it is customary for the companies to make provision in their accounts for what is known as *unexpired liability.* Fire policies expire on different dates throughout the year, and as the majority of them are taken out for twelve months, obviously at the close of the year in which they are issued and in which the premiums for them have been paid, a certain proportion of these policies will have a liability which does not expire until some time in the following year. Policies, *e.g.*, which have been taken out towards the end of the year for a period of twelve months will have the major part of their liability unexpired when the year closes. Clearly, therefore, the premiums paid for such policies cannot be appropriated to the year in which the policies were issued. The premiums are paid in advance for the full term of the insurance, and provide security against a loss happening at any time during the currency of the policies, whether the loss happens on the commencing date of the insurance or on the expiry date; and as the cost price of fire insurance cannot be definitely ascertained until the liability has terminated, it is the practice to set aside a certain portion of the premium income of one year as a reserve for the

liability under those policies which do not expire until the following year. This reserve, which represents the potential cost of these unexpired policies, forms an item of the cost price of fire insurance.

The expenses incurred by the companies in carrying out their operations form another item of the cost of fire insurance, and just as the price at which a commodity is sold includes the various costs and charges incidental to its production, in the same way the premiums charged for fire insurance protection include the various expenses—rent, salaries, management charges, advertising, and agents' commissions, to mention a few—incurred in providing that protection. There is no other source from which these expenses can be paid except out of the premium, which, consequently, must be sufficient not only to meet the normal fire hazard but the expenses as well, and leave a margin for profit, thus :—

Fire losses . . .	£550,000	= 55 per cent of premiums.[1]
Reserve for unexpired liability	50,000	(say 40 per cent of *new* premiums).
Expenses . . .	300,000	= 30 per cent of premiums.
Total . .	£900,000	= 90 per cent of premiums. — The *cost price*, or the total outgoings.
Profit	100,000	
	£1,000,000	= the *selling price*, or the total premiums.

[1] For the effect on the loss ratio of the operation of average, see supra, chap. xii.

In this example it cost in one year £900,000 to provide protection against loss by fire, the price charged being £1,000,000, leaving a profit of £100,000 on the year's operations. If the loss ratio had worked out at 65 per cent instead of 55 per cent, or if the expenses had amounted to 40 per cent of the premiums instead of 30 per cent, and this result had been produced consistently by each year's operations, the company would be selling at the bare cost of production, leaving no margin for profit. This condition of things, of course, could not continue, and the only remedy the company would have would be to increase the selling price.

That, however, is only one aspect of the question. It is not sufficient merely to compare the two sides of the account and be content if the balance is on the right side. Fire insurance operates over a wide field—as a matter of fact, the wider it is the more chance there is of success. It embraces a variety of risks of different degrees of fire hazard, and it not infrequently happens that while the results for any one year viewed as a whole are satisfactory, the experience in some particular class of risk may turn out unfavourable. When that happens and it becomes apparent that the rates charged for the class in question are no longer adequate—in other words, when the cost price of the particular class referred to is consistently exceeding the selling price—the latter must be increased. There is no other alternative short of refusing the business altogether, for it is

no answer to say that if one class is producing a loss, the loss is being fully covered by the profit from some other class. It is a maxim in fire insurance practice that each class of risk must pay its own way. This is in accordance with equity, for no risk should be rated higher than its natural fire hazard requires; but it is also in conformity with the fundamental laws which govern the price of commodities: for in fire insurance as in trade the selling price cannot for long be kept suspended above the natural price. Inevitably the one will approximate the other, and competition will be the biggest factor in bringing that about. Apart from any other consideration, therefore, self-preservation and the stress of competition will prevent a company from pursuing a policy that makes the profit from one class of risk pay for the loss from another.

Consequently, different rates are charged for different classes of risk, for the loss experience is different in each of them, and each contains certain features of hazard that are absent from the others. For the same reason, different localities are rated differently, and even sometimes the same class of risk will be rated differently according to where it is situated. The practice, therefore, is to fix a selling price for individual classes of risk and individual localities appropriate to the cost price of the class or the locality, as ascertained from the collective experience of the companies taken over a period of years. It may happen that an individual risk is proving unremunerative and

falsifying the general experience of its class; but in that case there will in all probability be some exceptional feature in the risk, or some special circumstance connected with it, to produce that result. It may be owing to some fault in the construction or internal arrangements, or the reason may lie in lax management or carelessness amounting to moral hazard.[1] Whatever the reason may be that produces the unfavourable experience, the principle of discrimination will operate against the risk, and either a special rate will be charged to meet the adverse conditions, or the risk be declined as undesirable business; for obviously it would not be equitable to increase the rate for the class as a whole merely because an individual member of it is proving unprofitable.

Notwithstanding that the cost price of fire insurance is an uncertain quantity liable to a sudden and unexpected rise, it is possible to estimate the probable normal cost of any class of risk with a degree of accuracy which, although lacking the mathematical exactitude of life assurance rates, meets the exigencies of the situation. This is achieved by reviewing the experience of the offices collectively for a period of years—say ten or twenty,—and comparing the total cost for that period with the total premiums. If the data collated in this way show that the class is being consistently underwritten at a loss, there being nothing of an abnormal nature to account for the adverse experience, the only alternative is to in-

[1] See supra, page 270.

crease the rates so that a proper ratio will be maintained between cost price and selling price. Moreover, if it is discovered that the losses are attributable mainly to certain features characteristic of the class, this must be taken into account in adjusting the rate. The rating methods followed in fire insurance are not arbitrary, but proceed upon the recognised principle of penalising such features in a risk as increase the fire hazard. The adverse experience may be attributable to the excessive size of the building, or it may be that certain processes carried on have contributed to the loss; but whatever the special features are that have produced the loss, the risk is rated in such a way as to penalise these features. Each class of risk is thus rated strictly in accordance with the fire hazard inherent *in the class* as demonstrated by experience; and so long as conditions remain normal, the selling price arrived at in this manner will be found to approximate the cost price.

The happening of some adventitious and untoward event, such as the San Francisco disaster, or any of the other serious conflagrations that have occurred at different times, will produce a sudden rise in the cost price. Events like these, however, are exceptional, and have only a temporary influence on the cost price, which finds its normal level again when the immediate effects of the event have disappeared. Of greater importance, so far as their influence on the fire loss ratio is concerned, are the changes which take place in

social and industrial and economic conditions from the application of science to industry and the introduction of new ideas and improved methods to trade and manufacture. These are not without their effect on the cost price of fire insurance. The substitution of one kind of motive power for another, or the introduction of new types of machinery, or an alteration in the process of manufacture, must be considered in relation to the fire hazard. Industrial developments and the progress of events, whether social or economic, need to be studied in order to find out how the fire hazard is being affected. If the risk of fire is increased the cost price will be increased also, for whatever affects the fire hazard will react on the cost price. The development which has taken place within recent years in motor transport is an illustration of how a new element of fire hazard may be introduced,—and where old methods give place to new, as, *e.g.*, when the steam-engine superseded the water-wheel and the windmill, to be displaced in turn by the dynamo or electro-motor or petrol-engine, or as when the power loom took the place of the hand loom, or the roller-mill that of the mill-stone, or generally when manual labour is replaced by power-driven machinery—the underwriter views these changes in the light of what they may mean to the cost price of his business. A difficulty may arise when an entirely new class of risk comes into existence, and where the fire hazard is to some extent an uncertain quantity. In such a case the rate to be charged is largely a matter of individual

opinion, or prejudice. But this only serves to emphasise the general principle of rating a risk according to its class experience, for as soon as sufficient experience has been acquired and the fire hazard is better understood, the rates, at first widely divergent, because depending upon individual judgment, begin to assume something like uniformity; in other words, the selling price, as is inevitable, gravitates to the cost price, and if a standard formula of rating is adopted based on the fire loss experience, the class becomes what is called, in the language of fire insurance practice, *tariff rated.*

The system of rating adopted in the United Kingdom among the tariff companies for tariff-rated risks is to start from a "normal," and impose "extras," or "additional rates," for such features of the risk as increase the danger of a fire breaking out, or as are likely when a fire does occur to aggravate its consequences. A "normal" rate, or what might be termed the *natural* rate, is the rate for the ordinary hazard incidental to the purposes for which a building is used, *i.e.*, the hazard inherent in the processes carried on in the building or in the goods contained in it, apart from any accumulated hazards, such as exposure, floor openings, artificial lighting and heating,[1] which are additional to the natural hazard. Different classes of risk possess different degrees of natural hazard, and different characteristic features that go to increase the natural hazard, or they

[1] See infra, page 293.

may possess characteristics in common but affecting the natural hazard differently. Thus, the natural hazard of a dwelling-house is less than that of a drapery shop, and the normal rate is consequently lower for the one than for the other; the human element is a factor in the fire hazard of a drapery shop, and the rate is charged as a rule according to the number of assistants employed, but it makes no difference to the rate for a dwelling-house how many persons are occupying it. A drapery shop artificially lighted by electric light is a better fire risk than one where open gas lights are used, but whether a dwelling-house is artificially lighted by electric light or by gas is not taken into consideration in estimating the fire hazard. Similar variations exist between different classes of trade and manufacturing risks, and these variations are reflected in the rating. A higher selling price is charged for one class of risk than for another, for the fire hazard is greater in the one than the other. On the other hand, if the fire hazard of an individual risk is above the normal hazard of its class, as, *e.g.*, where the building is of fire-resisting construction, or, as in some instances, is installed with an improved system of artificial lighting, or if it is equipped with fire-extinguishing appliances or other fire safeguards, so that if a fire did break out the resultant effects would be reduced to a minimum—in such a case the selling price is reduced by the discounts granted for these conditions, for it is recognised, and has been demonstrated by experience, that conditions such

as these tend to lower the cost price, and whatever produces that result reduces the selling price also.

The selling price of fire insurance, unlike the selling price of a commodity, is not affected by the operation of the law of supply and demand, for in fire insurance supply and demand are generally more or less co-extensive. The demand creates the supply, and the supply is usually adequate to satisfy the demand. Where, however, as it sometimes happens, an insured is not able to obtain all the fire insurance protection he requires, it might be said in that case that the supply falls short of the demand. That, however, will not affect the selling price, for although an insured may offer to pay an increased premium as an inducement to his insurers to give him the protection he needs, it is not likely that he will succeed, for no company can incur a greater liability than its resources will justify.[1] In the abstract it might be considered that if a company is receiving more premium than is paid under ordinary circumstances for some individual risk, it should be able to underwrite a sum in excess of its recognised "limit." Thus, if an insured offers to pay a rate that is 50 per cent above the usual charge, the company should be able to increase its ordinary limit in the same proportion. Whether that is a logical deduction or not is beside the question. It is not recognised in practice, and that in itself is sufficient to show that a shortage in the supply of fire insurance protection has no effect on the selling price.

[1] See infra, chap. xvi.

The effect of competition on the selling price of fire insurance is to maintain it at the level of the cost price. By effecting certain economies which tend to reduce the cost of production it may be possible to reduce the selling price of a commodity, but that may not be possible in the case of fire insurance. The principal item in the cost of fire insurance—the amount paid for fire claims—must from its nature always remain uncertain. For that reason the cost is more or less speculative, depending not upon any definite knowledge, but upon the probable happenings of the future, which may or may not turn out according to expectations. The actual cost, therefore, is estimated at the time the selling price is fixed, the estimate, as has already been stated, being based on the supposition that the past will repeat itself in the future. If it requires a certain rate to meet the cost of some individual risk estimated according to the past experience of other risks of the same class, to reduce that rate means either that the risk in question is superior to the average of its class, or that the company under stress of competition is taking a more favourable view of the hazard than is warranted by experience. In the former case there is justification for reducing the rate, for, to borrow the analogy of commerce, the production costs are lower than with other risks of the same class; but in the latter there is no justification for the reduction, for the company will then be deliberately selling under cost. If competition is doing nothing more than keeping the selling price

at the level of the cost price—neither very far above it nor very far below it—it is doing only what was to be expected; but if it has the effect of forcing down the price so that fire insurance is no longer being sold at what it is worth—*i.e.*, at what it costs to provide it,—then the result can only be a loss.

There are two outstanding characteristics of fire insurance which distinguish it from the ordinary operations of trade. When a commodity is sold it is given in exchange for the purchase price and the purchaser receives at the time of purchase the thing he has paid for, but when he pays a premium for fire insurance he receives nothing in exchange except an undertaking by the company to perform certain duties under certain circumstances at some time in the future *if required to do so.* In the one case the purchaser receives some immediate return from the purchase; in the other he receives only a promise, the fulfilment of which depends upon some future contingency which may or may not happen. A transaction of this nature implies a large amount of confidence on the part of the insured in the integrity and good faith of his insurers. A premium is paid, but nothing tangible is received in exchange—in the way that when the purchase price of a house is paid the purchaser gets possession of the house. The premium paid for fire insurance purchases immediate protection, but until a loss arises the contract remains inoperative, and the insured receives nothing in return for the premium except

an undertaking that if and when a loss does occur, he will receive the indemnity for which he has paid in advance. He places reliance on the good faith of his insurers, that when the time comes for them to do so, they will perform the duties which they contracted to perform. A contract of insurance can, of course, be enforced against the insurers by legal process, but it would be no inducement to any one to make such a contract to be told that if the company should default he can always have recourse against it at law. The insured must feel satisfied that the contract he has made will be observed in good faith by the company, and that his rights and privileges under the contract will not be prejudiced by the company, either as a result of reckless underwriting or through lack of skill and judgment in conducting its operations. Fire insurance can succeed only so long as it retains the confidence of the insuring public, and the same, of course, holds true for all forms of insurance.

This brings us to the second of the two characteristics which distinguish fire insurance from the ordinary operations of trade. If a commodity is sold at a loss, the loss falls on the individual who sold it; in fire insurance, on the other hand, it would fall on the whole body of the policy holders. The funds which the fire insurance companies administer belong to the insured: they are of the nature of trust funds held by the companies for the benefit of their insured, and with the exception of the shareholders' capital, which forms only a fractional part of the total funds, represent the

accumulated premiums which have been paid for fire insurance protection. It is out of these accumulated premiums that the companies meet their liability to their insured, and if they are being depleted to meet trading losses incurred through underselling or injudicious underwriting, the policy holders suffer through their security being diminished. What should have been held in reserve to provide indemnity for the insured is being utilised to pay losses that might not have been incurred had wiser counsels prevailed. For these reasons—(1) that in order to make their operations successful the companies must retain the confidence of their insured, and (2) that any losses which may be incurred in carrying out the business of fire insurance must be paid by the insured—the companies as a rule adopt a conservative attitude with regard to the price they charge for fire insurance protection, and competition, while it may affect the selling price to some extent, can only do so within limits.

2. *Accumulation in Fire Risk.*—Accumulation in fire risk may be defined as such a combination of individual hazards so existing together, or in proximity to one another, as to increase the danger of a fire breaking out or the danger of it spreading. The cumulated hazards make an outbreak of fire more imminent, and the resultant loss greater, than would otherwise be the case if these individual hazards had no connection with one another.

In estimating the fire hazard of any building it is necessary to take into consideration not only

those features which may cause a fire to break out in the building, but those also which may communicate a fire from an adjoining building. A building may technically be an independent risk, more or less immune from fire, and yet be exposed to danger from a fire in an adjacent building, owing to the presence of certain features that may contribute to the spread of a fire. In considering this question of accumulation in fire risk, therefore, it is necessary to have regard to the effects of such accumulation—

(1) In causing an outbreak of fire; and

(2) In assisting the spread of a fire.

The hazard may lie in the construction of the building, and be external or internal—external in respect that the building may be, in whole or in part, of what is known as *defective construction;* but even if the building is of ordinary construction, *i.e.*, with walls built of stone or brick and the roof covered with slates, tiles, or metal, some exposed external woodwork—such as wood-louvred ventilators on the roof, or lantern roof-lights—may prove a source of danger—and not an unlikely one —for if sparks from a neighbouring chimney, say, found a lodgment about the woodwork, in all probability an outbreak of fire would ensue. Or the hazard may arise from the internal arrangements of the building—from such details as floor openings, wood linings, wood partitions, concealed spaces in roofs, under floors, or behind partitions; exposed ironwork, areas, and well-holes; artificial lighting and heating systems, and the power-

generating and transmission plant. These are all hazards of a physical nature, and any one of them is a likely source of danger. They need not necessarily *all* be found existing in conjunction in the same building, but a combination of some of them will frequently be met with, and when it is there is such an accumulation of hazard as to accentuate the danger of an outbreak of fire, for they intensify the *natural* or *normal* hazard of the risk, *i.e.*, the hazard incidental to the particular purpose for which the building is used. If the trade or trade processes carried on in the building or the goods contained in it are of a hazardous nature, obviously the natural hazard will be increased by the presence of these other hazards. This is especially the case where the building is occupied by several tenants for a variety of purposes, each of which may possess a hazard of its own—what is technically known as *plurality of tenure*,—for then there may be superimposed on the fire risk arising from the accumulation of hazards the further risk arising from moral hazard. That is a conjunction of circumstances by no means uncommon in large industrial centres, and presents an example of accumulation in fire risk of an acute form.

If the processes which are carried on in the building are extended or new processes added, an increase in the degree of fire hazard contained in the building may be expected. Thus, if a joiner starts business with one employee only and no machinery, but later, as his business begins to extend, adds to the number of his employees, and

later still, as his business continues to extend, finds it necessary to install a woodworking machine, which he subsequently augments by introducing more machinery and some power unit to drive it,—the fire risk of the workshop has progressively increased. What was to begin with a simple joiner's workshop has developed by a gradual process of extension into a more or less complex power-driven woodworking risk. It is the practice in the case of some manufacturing and trade risks to judge the fire hazard by the number and class of machines used, or the number of hands employed, or by the "capacity" of the building. An underwriter, if he is told that one woodworking risk has fewer machines in use and a fewer number of hands employed than another, will classify the latter as a heavier risk than the former. He will draw a similar comparison between two cotton mills, one with more spindles at work than the other, and between two flour mills with different lengths of roller contact, for the more extensive the processes carried on the greater the fire hazard. If, again, the underwriter is given the respective cubical capacities of two warehouses of the same class, he will discriminate in favour of the smaller of the two, since size, or capacity, is also an important factor in fire hazard.

The larger the building the greater will be the area exposed to a fire. The values contained in it will also be greater, and the loss when a fire breaks out will be more severe than if the building had been of more modest dimensions. In some

manufacturing risks it is necessary for purposes of efficiency and organisation to have the various departments as near one another as possible; hence the tendency is to congregate these, if not under the same roof, in adjacent buildings with free communication between them, thus constituting what is called "one risk" with no efficient check against a spreading fire. So important is the question of size, or *magnitude*, in relation to accumulation, that in some classes of risk double fireproof-door separations are not regarded as a sufficient protection against the spread of fire or the effects of a fire. Whisky bonds are a case in point. Where a bond exceeds a stated cubic measurement, the fact that there is a communication with another bond, whether by double fireproof doors, or across a fireproof compartment, is a factor in the rating, and not only in the rating, but in determining the extent of a company's net holding. The reason for this is the danger to be apprehended from the flow of burning liquor, which in all likelihood would penetrate under the doors and carry the fire into the adjoining bond. As the values contained in such risks are considerable, it is safe to conclude that a fire will involve the companies in a serious loss every time.[1]

[1] As was instanced in the case of the fire which broke out in May 1922, in one of the bonded warehouses at the Glen Rothes Distillery in Scotland. The fire spread into an adjoining bond, which had the usual double fireproof door communication, and would possibly have involved a third bond (also with double fireproof door communication), had it not been for the prompt

Retail sale shops are another class of risk where double fireproof door protection to openings between communicating buildings is not regarded as sufficient to localise the effects of a fire, and in some classes of trade risks the requirements for an effective separation between buildings are more stringent than in others. The reason is that the nature of the trade carried on, or the nature of the goods stored, makes the consequences of a fire in such risks more serious than in others.

Exposure hazard is another important factor in fire risk, and particularly where the buildings are in a congested area, for then the accumulation of hazards is considerable, since a fire breaking out in one building may jeopardise the other buildings in its vicinity. By "exposure hazard" is meant the danger to which a building is exposed from a fire in an adjacent building. This may arise from windows or other openings in the building, opposing similar openings in another building so that both buildings are brought within risk of a fire in either of them; or if the adjoining buildings are of different heights with windows in the higher buildings overlooking the roof of the lower, a fire in the latter might be communicated to the others through these overlooking windows—this also is exposure hazard, and the danger from this source is not infrequently greater than from any hazard

measures taken by the distillery manager, who banked up the doors with turf and so prevented the burning whisky getting underneath them. The loss to the companies was estimated at £250,000.

incidental to the building itself. In order to arrive at a proper estimate of fire risk, therefore, it is necessary to take into consideration not only those features that may cause a fire to break out, but those also that may cause a fire to spread.

Summarising the whole matter, accumulation in fire risk may be found under the following conditions :—

(1) Details of construction.
(2) Plurality of tenure, or multiplicity of processes.
(3) Extension of processes.
(4) Size or magnitude.
(5) Congested areas and exposure hazard.
(6) Generally, where the degree of hazard is increased by the addition of new hazards.

It would be supposed that in rating risks where this accumulation exists the companies would in every case impose extra rates to meet the accumulated hazards. It is here, however, that the theory of accumulation breaks down in practice. The theory relates to accumulated hazards, or hazards superimposed on one another, where the risk becomes more complex in character as the hazards progressively increase, but the increase in the incidence of rating does not always in practice keep step with the increasing hazards. How, *e.g.*, is a building rated which is tenanted jointly by a draper, a grocer, and an oil-dealer? If we argue that each of these trades has a hazard of its own, and that the hazard incidental to each is increased by the hazard incidental to the others, then it

would appear that the only correct method of rating would be to cumulate the rates for each individual tenant considered separately, and charge that for the cumulated hazards of the whole risk. This, however, is not the usual practice. What is done is to apply the rate for the most highly rated trade or process to the whole building, on the principle, presumably, that the greater contains the lesser. Even that method is not always adopted in rating sale shops, with the result that we find a grocer rated at the stereotyped rate for that class of trade, irrespective of the fact that the building may be otherwise occupied as shops rated at a higher figure.[1]

This seems neither logical nor scientific. If we agree that the accumulation in risk caused by the different trades carried on in the same building increases the fire hazard of the whole risk beyond what is represented by the most hazardous among these trades, the rate should be fixed accordingly, and instead of charging the highest rate, something extra should be imposed to meet the additional hazards of the other trades.[2] If the theory were translated literally into practice, the rate for each

[1] A modification in the practice is made, however, where a proportion of the contents rate for the dominating risk (when that exceeds a specified minimum) is charged for the building, and the other tenants.

[2] A not inappropriate illustration may be found in the method sometimes adopted for rating floating insurances, where the practice is to charge the rate for the most highly rated risk in the range with *something added*, say, 6d. per cent or 1s. per cent for each additional risk included in the range.

hazard should be cumulated, and the figure thus brought out charged for the whole risk, as is done by the tariff system of "extras." The same anomaly is met with in the case of certain manufacturing risks where two or more processes are carried on in the same building. It is not unusual in a woollen-mill risk to find carding, spinning, and weaving carried on under the same roof. These three processes rated individually take different rates, for they possess different degrees of fire hazard, but when they are all carried on together the rate charged is again the rate for the most hazardous among them—in this case carding,—the hazards incidental to the other processes being ignored.[1]

The problem of how to rate adequately for accumulation in risk is not easy to solve, for it is difficult to formulate rules that will apply equitably in every case. The tariff system of imposing "extras" for specified features of hazard goes some distance towards meeting the difficulty, as, *e.g.*, where an extra charge is made for tenure, or for capacity, or for multiplicity of trade processes, or for exposure, and so on. These extras, however, are not general to all classes of risk, and there is no adequate reason why they should be, for, after all, the only equitable method of rating is on the basis of actual experience in relation to individual classes of risk. While, therefore, a cer-

[1] This aspect of the subject is discussed by Mr Robb in his paper on "Accumulation in Fire Risk" (vol. i. of the 'Chartered Insurance Institute Journal').

tain method of rating may be theoretically the only correct one, the fire loss ratio for some particular class of risk will make its application to that class impossible, for the same element of hazard will produce different results in different classes of risk.[1] Consequently, accumulation in fire risk must be considered in relation to its effects, whether in causing an outbreak of fire or in assisting its progress. In one case the existence of such accumulation may result in a serious loss, in another have little effect either in causing a fire or on the subsequent loss. This will depend upon the inherent hazard of the risk. Thus, size may be an important factor in the extent of the loss produced in one class of risk, but be of little consequence in another: in one case it may require double fireproof doors to arrest the progress of a fire, in another a single door will suffice; while in another, as has already been noticed,[2] even double fireproof doors may not be sufficient to localise the effects of a fire. The risk of "exposure" will vary in degree according to the amount of natural hazard contained in the buildings affected—if, *e.g.*, one of them contains goods of an inflammable nature, the fact that it is exposed to the risk of a fire in another building is a more serious matter than if the goods contained in it were of a nonhazardous description; again, whether the building is a storied one or a shed will be one of the factors determining the extent of a company's net holding in some classes of risk, and so on. For

[1] See supra, page 288. [2] See supra, page 297.

this reason it is impossible, as well as impolitic, to formulate hard and fast rules of rating to meet accumulated hazards. Rating—synthetic rating especially—is governed by the fire loss experience, and the components of such rating will vary with that experience.

3. *Fire Waste.*—Co-related to this subject of accumulation in fire risk is that of *fire waste.*

The disastrous conflagrations which have occurred from time to time both at home and abroad —although fortunately of rarer occurrence here than elsewhere—emphasise the serious consequences that are likely to follow upon an outbreak of fire. If the fire could be confined every time to the building in which it originated, the loss, distressing though it may be, need not amount to a calamity, but when the conditions are such that a fire breaking out has every likelihood of developing into a catastrophe where life and property are sacrificed—as has happened not a few times,—the question becomes a serious one for the insurance companies and the community as a whole.

Fire destroys wealth, and when wealth is destroyed, no matter how, it cannot be restored. It is irretrievably lost. The function of fire insurance is to protect the insured from financial loss and embarrassment, not to restore what the fire has consumed. Its purpose is to rehabilitate the insured in the position he occupied before the fire and give him the value of what he has lost—that is the essence of fire insurance protection. But it can only accomplish this at other people's expense.

Somebody *must* lose by a fire—that is inevitable, but fire insurance prevents the loss from falling upon one individual by distributing it over several,[1] and by thus disseminating it, makes the loss easier to be borne.

Fire insurance, however, does not create new wealth, nor do the premiums which are paid for fire insurance purchase wealth, for fire insurance is non-productive. If fire insurance protection were unnecessary—if, that is to say, an outbreak of fire were an event so unlikely as not to be worth a moment's consideration,—the funds accumulated by the fire insurance companies, representing many millions of pounds paid in fire insurance premiums, would be available for remunerative and wealth-producing purposes. As it is, the premium which the insured pays for his fire policy is regarded by him as one of those charges he must pay, but would be better pleased to be without. It provides him with protection against a loss that would fall on him in the event of a fire, but he derives no profit from it, since what benefit it does give him leaves him no better off than he was before. It merely substitutes the money value for what the fire has destroyed, and to provide that others besides himself have had to contribute. Fire insurance premiums, therefore, are unproductive charges. They are paid in order to make provision against a contingency which it is hoped may never arise, and the only benefit which fire insurance confers consists in the security it gives against financial loss.

[1] See supra, page 8.

This, however, is an asset of no inconsiderable value to society in general, but in particular where capital has been ventured in trade and industrial enterprises. Fire insurance is non-productive itself, but it can be said to assist production, for by the security it is able to provide it allows capital to be employed to a greater extent and with greater freedom than would otherwise be possible without it. A fire policy does not, of course, ensure that there will be no destruction of capital by fire, any more than a marine policy ensures that the ship with her cargo will not be lost by the perils of the sea, but it gives assurance that if fire does destroy capital the person who has ventured the capital will not be faced with irretrievable loss. It thus removes the incubus of doubt and uncertainty from commercial activities, and stimulates trade and industry by allowing the free employment of capital unfettered by the fear of loss through exposure to an adventitious event which might easily spell ruin and disaster. Fire insurance is thus a national asset, for whatever benefits trade contributes to the national wellbeing.

The loss and waste which a fire brings about can only be avoided if an outbreak of fire is rendered impossible. If that cannot be done—and it is too much to expect that the risk of fire will be wholly eliminated,—then the next best thing is to improve the conditions so that the chances of a fire breaking out will be reduced to a minimum, and the loss kept within reasonable limits.

While there is at present no special legislation

dealing with an accidental outbreak of fire beyond a police inquiry into its cause,[1] various regulations are in force, both imperial and municipal, which, although framed primarily in the interests of public safety, exercise some influence on the material effects of a fire. There are local Building Acts, and local laws for such places of amusement as theatres and music-halls.[2] In the case of cinematograph halls the projector apparatus must comply with certain statutory requirements.[3] There are also the statutes which regulate the use and storage of substances of an explosive or highly inflammable nature,[4] and the statutory powers given to local authorities to equip and maintain a fire brigade service.[5] These various measures are of a protective nature, intended to prevent loss of life through a fire, but at the same time they have the effect of improving the fire hazard by reducing the risk of fire and its attendant waste.

It is chiefly on the fire insurance companies, however, that the duty of minimising fire waste has devolved, and unquestionably a fire insurance company is qualified by its trained knowledge and experience to express an authoritative opinion on

[1] An incendiary fire—what is referred to in England as arson, and in Scotland as fire-raising—is a felony and punishable as such.

[2] It may be mentioned in this connection that the London County Council and the Birmingham Corporation require the stage portion of theatres and music-halls to be protected with automatic sprinklers.

[3] Cinematograph Act, 1909, and the regulations made under it.

[4] Explosives Act, 1875, Petroleum Act, 1871, and their amending Acts.

[5] See infra, page 341.

the subject. The business of fire insurance is primarily to mitigate the loss which a fire brings about, but that is not the *summum bonum* of fire insurance. It was bound to follow as an inevitable result of the operations of fire insurance that the loss and waste caused by fire should become appreciably reduced. The reason for this is not difficult to find. It pays better to accept lower rates and a lessened fire risk than higher rates and correspondingly heavier losses; and as no wise underwriter will be content to increase the selling price of the protection he offers if he can see a way of reducing it by lowering the cost price, the practice of fire insurance has had the effect of reducing the risk of fire. If the company sees that the risk which is offered to it possesses features which are likely to increase the risk of an outbreak of fire or aggravate its consequences, it will endeavour to have these dangerous features removed, and in doing this it reduces the fire risk and the resultant loss and waste of fire. How does it accomplish this?

Chiefly by the rating methods adopted in fire insurance. These are not arbitrary charges, but are fixed with due regard to the fire hazard, and represent the price at which the companies are willing to sell the protection they are able to offer. But as the business of fire insurance cannot—any more than any other commercial undertaking—be conducted at a loss, the selling price—*i.e.*, the premiums charged for fire insurance protection—must necessarily bear some relation to the cost

price—*i.e.*, the amounts paid out to meet claims and other charges.[1] Hence it follows that if anything is done to increase the fire hazard there must be a corresponding increase in the rate of premium charged, and conversely, if the hazard is reduced in any way the rate will be reduced also. Thus, if an insured wants to add to his plant, or to extend the processes carried on, or make some other change, and these have the effect of increasing the fire risk, either must he pay more in premium, or make such other plans as will not disturb the existing hazard of his premises; or if he proposes to erect a new building he will be consulting his own interests if he takes counsel of his insurers, who will be able to give him such advice as will tend to minimise the fire hazard of the new structure, and at the same time effect a saving in premium. On the other hand, if he effects improvements that lessen the fire hazard he reaps the benefit of these in a lower rate of premium. It is by these methods that the companies bring pressure to bear on their insured—on the one hand by loading the rate to meet the increased hazard, and on the other by granting concessions where the conditions tend to reduce the fire hazard or lessen the consequences of a fire. These concessions take the form, either of lower rates or of discounts for such features as fire-extinguishing appliances, automatic sprinklers, and fire-alarms, or for improved building construction, improved forms of artificial lighting, and so on. The insured is en-

[1] See supra, page 282.

couraged by these concessions to improve his risk, and as a rule he is not slow to take advantage of them.

One hears it stated sometimes that anything is insurable *at a rate.* However possible this may be in theory, it is not always expedient in practice. Occasionally for special reasons a company has to underwrite a particularly heavy risk at a high rate of premium, but no company would feel comfortable whose income was derived from risks of that description. It is wiser policy, and a better paying proposition, to have dangerous elements removed than to allow them to remain, with a rate loaded to cover them. If a fire surveyor notices a stove pipe in contact with woodwork, he does not add so many shillings to the rate to meet the hazard, but asks for the woodwork to be cut away. If protecting the openings between communicating buildings by fireproof doors will effect a reduction in the rate, the company will suggest this course, and the result will be that not only will the insured save something in premium, but the fire risk will be improved also: the area exposed to a fire will be curtailed, so that when the fire does occur the loss will not be so great as would otherwise be the case.

It may be argued that in all this the companies are simply considering their own interests. This may be so, for, of course, the companies have a natural desire to make their business profitable and keep in favour with the insured; but if at the same time they are bringing about a better condition of things, no one need object to their

methods. The more profitable fire insurance underwriting can be made the better it will be for the insuring public, on whom must ultimately fall the losses caused by fire. The business of fire insurance cannot be conducted at a loss—whether the insurers are the State, or a municipal body, or a joint-stock company,—and while serving their own interests, if the companies are bringing about a reduction in the waste which a fire causes, it is the public who will benefit. That, of course, is bound to follow. The companies have no other means of paying losses except out of the premiums which are paid for fire insurance.[1] It is in this way that the theory of insurance is translated into practice. Consequently, the greater the loss and waste caused by fire the more will the insuring public be called upon to pay to make good the waste,—*i.e.*, so far as *insured* waste is concerned: and since fire insurance cannot be sold under cost, if the premiums paid for fire insurance protection are not sufficient to pay the wastage wrought by fire to insured property, these premiums must inevitably be increased. If, therefore, the operations of fire insurance bring about an improvement in the fire hazard so that the risk of an outbreak of fire is reduced or the resultant loss and waste minimised, the burden is made lighter for the insuring public, who, as the result of the improved condition of things, will be able to purchase fire insurance protection more cheaply than would otherwise be possible.

[1] See supra, page 9.

The companies have no powers, apart from their rating methods, to enforce their views. They may make suggestions, but however reasonable these may be and to the insured's advantage, they cannot insist that they shall be adopted if the insured chooses otherwise, and the only course open to them is to increase the rate or decline the insurance—at best an unsatisfactory way of solving the difficulty. Where, however, the matter is outwith the company's jurisdiction—that is to say, where the risk in which the hazard lies is not one with which the company has any concern,—it has no direct means of bringing about any improvement. The company's insurance may apply to a building possessing no special feature of hazard in itself but be exposed to danger from a fire in some adjacent building in a different occupation. No matter how the company may load the rate for the building in which it is interested, that will have no effect in remedying the fire hazard. If the fire insurance companies possessed powers by which they could take action through the local authority in cases such as this, or in others where their usual methods are unable to effect any improvement, more might be done in the direction of minimising fire waste. The question is one which concerns the community as a whole. An ordinary outbreak of fire may have such serious consequences that it is an imperative necessity for local authorities in the public interest to have statutory powers to compel the removal of whatever may aggravate a fire or its consequences.

Local authorities already possess powers for extinguishing a fire—both in their own areas and beyond them,—but that is something akin to shutting the stable door after the steed is stolen. Prevention is always better than cure, and to prevent an outbreak of fire is wiser policy than providing an elaborate and expensive fire-fighting organisation. Might the suggestion be made that if local authorities would take advantage of the knowledge and experience which the fire insurance companies possess on this subject, and act in collaboration with them, much might be achieved in the way of fire prevention, and the annual toll of loss and waste taken by fire, it is reasonable to assume, would become appreciably diminished.

CHAPTER XV.

THE LOSS: "EX GRATIA" PAYMENTS: EXTINGUISHING EXPENSES.

THE *sum insured* by the policy represents the company's maximum liability, or, in other words, the utmost it can be called upon to pay during the current term of the policy. If more than one loss is paid in that period the aggregate amount paid cannot exceed the sum insured, since each payment reduces the sum insured by the amount so paid, and if a total loss is paid then the sum insured is exhausted, and the contract comes to an end. The amount paid in respect of each loss can, however, be reinstated, and the sum insured brought back to the original amount, by an endorsement on the policy, an additional premium being charged for the sum thus reinstated for the period the policy has still to run. If the policy is an annual one, payment of the renewal premium reinstates the sum insured to what it was originally.

In the same way when the policy contains more than one item, the sum insured against each item is the maximum liability in respect of the property

insured by the respective items. Each item relates to different property—one covers building, another machinery, another stock, and so on. Although they are contained in the one policy, they are independent of each other. A loss on building cannot be paid under a stock item, and if one is under-insured and the other over-insured, the shortage under one cannot be made up out of the excess in the other. Nor where the different items relate to different buildings, or to the contents of different buildings, can a loss on one building be covered by the item on another building.[1] In drafting a fire policy, therefore, it is necessary to exercise care that the items do not overlap—that is to say, that the same property is not being insured by two or more items. Thus, if the item insuring machinery were worded to include fixtures, fittings, and *utensils*, and the stock item in the same policy made to read, "On stock and *utensils* in trade," utensils would then be covered under both items. This, of course, is faulty drafting, and should be avoided.[2]

The rule in practice that a building must be insured separately from its contents is not arbi-

[1] See supra, page 40.

[2] The building item of a policy includes all heritable fixtures and fittings, such as heating and lighting installations, fixed shelving and fixed partitions, and generally what are termed landlord's fixtures and fittings,—*i.e.*, all fixtures attached to the building and which could not be removed without interfering with the structure. In drafting a fire policy, therefore, it is necessary to avoid including in the contents item anything that pertains to the building and which would be included in the building item as a heritable fixture, unless specifically excluded.

trary, but is based on the same principle of equity that requires a floating insurance to be made subject to average.[1] A fire may cause considerable damage to the contents, but it does not necessarily follow that the building will be involved to the same extent. Even a serious fire need not result in a total building loss, although in all likelihood it will be so on the contents, for there is usually more salvage from a building loss than there is from a contents loss, especially stock, unless the building is materially under-insured, for then the loss under the building item might easily be total, since the company would get no benefit from the salvage. This being so, if buildings and contents were insured in one amount, the insured might be tempted to insure for less than the aggregate values, knowing that in the event of a serious contents loss with only slight damage to the building, the whole amount of his insurance would be available to cover the loss, notwithstanding the under-insurance. Where, however, buildings and contents are insured separately, the company's maximum liability is limited to the sum insured on each of them respectively, and the excess of insurance over the loss on the one cannot be applied to make up the under-insurance on the other.[2] The position would be different if average was applied generally to fire insurance, for there would then be no apparent reason why buildings and contents could not be insured in one amount, seeing that with average applied the insured would

[1] See supra, page 249. [2] See supra, page 314.

require to insure for the full aggregate values, or bear a share of any loss proportionate to his under-insurance; but in the absence of average, if under-insurance with its resultant effect on the loss ratio is to be avoided, it is as much to the insured's interest as the company's that different species of property should be insured separately.

Except in the case of a valued policy,[1] the sum insured does not determine the amount recoverable under the policy; it only fixes the maximum which can be recovered. The true measure of the loss is the value the fire has destroyed. If that is less than the sum insured the insured can recover no more than "the real and actual value of the goods"; if it is in excess of the sum insured then the sum insured is all that can be paid. But the value which determines the amount of indemnity to which the insured is entitled is the value of the property *at the time of the fire*, ascertained according to the circumstances of the case, or the value of his interest in the property, which may or may not be co-extensive with the value of the property.[2] In mercantile insurances the expression used in the policy is "in no case exceeding the market value immediately anterior to the fire," but whether it is expressed in these terms in the policy or not, the value of the property at the time of the fire must form the basis for arriving at the loss. Whether that is more than the original value, or less, does not affect the question, since the loss

[1] See infra, page 376. [2] See supra, page 27.

sustained by the insured must be the value which the fire has destroyed.[1]

Different rules apply for ascertaining the value at the time of the fire according to the nature of the property insured, viz. :—

1. In adjusting a *building* loss it is the practice to take the cost of rebuilding, or reinstating, as the basis for arriving at the amount of the indemnity; but in arriving at the actual loss due allowance must be made for the state of the building at the time of the fire, for obviously if the building is in a state of disrepair, to pay the cost of rebuilding would be to give the insured more than an indemnity. He would be receiving a better thing than he had before. Lord Esher's views in *Lister* v. *Lane* (1893), that a tenant's liability under the repairing clause of a lease requires him only to repair the building as he had got it, are equally applicable to the liability of an insurance company for a building loss. "He (the tenant) is to repair that thing which he took; he is not obliged to make a new and different thing," and similarly, an insurance company is not liable for more than what it will take to restore the building to the condition it was in before the fire. To do more would be to give new for old. The intrinsic value of a building is the cost which would be incurred to erect it. The market value, or the price that would be obtained for it by selling, may be different altogether from the actual value, and it may even happen in some cases that

[1] See supra, page 14.

a building has no real market value, because the purposes for which it was erected or its adaptability for other uses, or its location, may be factors militating against its selling value.

A building erected for a specific purpose possesses a value independent of its selling value, for the price it would bring if put up for sale would be governed by various considerations—*e.g.*, whether the purchaser intended to use it for similar purposes to those for which it was erected, or whether it could be readily adapted to other uses, and so on. These considerations, however, might be no criterion of the loss which the owner would sustain if he had to reconstruct the building after a fire for his own purposes, and consequently, to adjust the loss on the basis of selling value instead of reinstatement value might not be to give the insured a full indemnity.

On the other hand, conditions may arise to send up the market value in excess of the intrinsic value, as happened during the war, particularly in the case of dwelling-house property, when, owing to the operation of the law of supply and demand, that class of property rose considerably in value. But such considerations, which are entirely abnormal, do not affect the reinstatement costs of the building, and, consequently, have no bearing in determining the amount recoverable under the fire policy, which must be based on the actual, or reinstatement value.

Tenancy agreements sometimes contain a provision requiring the tenant, or lessee, to keep the

buildings in a state of repair during the term of the tenancy. This gives the tenant an insurable interest in the property, and to cover his liability to the landlord, or lessor, he effects an insurance over the property.[1] In the event of a fire, if he recovered only the market or selling value of the buildings he might not be fully indemnified, since under his tenancy agreement he would be obliged to reinstate. Consequently, unless he was indemnified on the basis of reinstatement value, his loss might not be adequately met.

Difficulties may arise where at the time of the fire it is the intention to demolish the building. The question to be decided then will be whether the building possesses any value *as a building*, or whether the only value that can be considered is the selling value of the materials that comprise the building. If the insured intended to pull the building down to erect a new one on the site, then it might be held that the only value of the building to him is its value as old material, and to pay more than that would be to give the insured more than his actual loss. But although the insured *intended* to demolish the building, if the work of demolition had not commenced the building at the time of the fire would still exist as a building possessing a value as such, and this being so, the company might not be justified in taking advantage of what the insured contemplated doing with it at some future date. If the insured instead of pulling down the building decided to sell it,

[1] See supra, page 203.

and that at a time when there was a slump in the property market, would he be indemnified only on the basis of the price the building would have fetched had it been sold on the day of the fire? or, if instead of either pulling it down or selling it the insured decided to make more or less extensive alterations to the building, necessitating possibly the removal of a considerable portion of it, would that be taken into consideration in adjusting a loss? It might be argued from the principle of indemnity that the insured's intentions with regard to the building, whether, *i.e.*, he meant to pull it down or to sell it at a loss or to alter it, must be taken into account, as otherwise he would be indemnified in excess of his loss. To be consistent, however, the same rule would require to be applied in other cases, as, *e.g.*, where a trader intended to realise his stock by a forced sale. If a fire damaged or destroyed the stock before the insured could carry out his intentions, it would not be possible to adjust the loss on any other basis than the value of the stock at the time of the fire, for no other value would be available by which to measure the loss, although the fact that the insured was prepared to sell at a sacrifice might be used to compromise with him in the adjustment of the loss, otherwise he might recover more by the fire than he would possibly have done had there been no fire. In the case *Collingridge* v. *Royal Exchange Assurance Co.* (1877), where a building had been acquired by the Metropolitan Board of Works to be demolished to make way for certain street im-

provements, but before conveyance, was burned, the court held that the insured was entitled to recover from his insurers the purchase price of the building as agreed by arbitration, and not merely its value as old material. In a case such as this, however, the question should not be of much material moment to the company, seeing that as the building formed the subject of a sale contract the company would be subrogated to its insured's rights against the purchaser for the purchase price.[1] Apart from this, however, where a building is unquestionably doomed, and, consequently, ceases to possess any value as a building, it would seem to be disregarding the principle of indemnity to pay in the event of loss on the basis of reinstatement value.

2. A loss on *machinery* is adjusted on the basis of actual value at the time of the fire. Machinery depreciates in value with age and usage, so that in order to ascertain the value at the date of the fire it is necessary to deduct from the original cost a certain percentage as representing the rate of depreciation. As, however, some types of machinery "run down" quicker than others, the rate of depreciation will vary according to the class of the machine and the nature of the work it is doing, and in making the allowance for depreciation this is taken into account. Further, as the working life of a machine depends to some extent on whether it has been well looked after or the reverse, some allowance is usually made for the outlays expended on repairs and renewals to keep

[1] See supra, chap. ix.

the plant in order and up to date, for obviously if the plant has been well looked after and kept in repair, its value is greater than if it were allowed to fall into disrepair through neglect. In adjusting a loss on machinery, therefore, the new price is first ascertained; from this is deducted a certain amount for depreciation, with something added for repairs and renewals, and the value thus brought out—what is usually spoken of as the *going concern value*—forms the basis for adjusting the loss. But other things besides the natural depreciation due to wear and tear may affect the value. The machine, *e.g.*, may have become obsolete, either because later models have been improved, or because entirely new models have been put on the market, both more economical and turning out better work than the old types; or the machine may have diminished in value owing to a reduction in the price of new machines of the same pattern. In order, therefore, to arrive at the actual value as at the date of the fire, these various factors—age, usage, and depreciation due to whatever cause, all of which go to diminish the original cost—must be taken into account.

It may be argued, however, that the insured, to be fully indemnified for his loss, is entitled to recover the cost incurred by him in replacing the plant destroyed by new plant of the same type; in other words, he is entitled to the replacement value of the machinery. A machine, it may be argued, is used by the insured in connection with

his business, and has no market value in the sense that an article of manufacture possesses a market value—*i.e.*, the value created by a public demand. The real value of a machine to the insured arises from its usefulness and efficiency for the purposes of his business, and this value may be in no way diminished through age or depreciation. The insured derives a benefit and advantage from the use of the machine, but this would be lost to him if the machine were destroyed, and before the advantage could be restored the insured would require to incur the cost of a new machine to replace the one which the fire had destroyed. To that extent the fire has prejudiced him, by involving him in an expense he would not have incurred but for the fire, and to that extent he may consider he is entitled to be indemnified.

These considerations, however, cannot affect the question. Machinery does not appear in the insured's books as an asset at its original value, for a certain amount is written off annually for depreciation. A book value, of course, is not always a criterion of the actual value, for sometimes a greater amount is written off than is required by the natural rate of depreciation; but if a machine stands in the insured's accounts at, say, 50 per cent of its original cost, and he recovers its actual value at the date of the fire, he is obviously receiving a full indemnity. Although he may have to pay more than that for a new machine—as in all likelihood he will—this additional expense is only one of those consequential losses incidental to

almost every fire,[1] and besides it is an expenditure for which provision will most likely have been made in the insured's accounts. The position may be regarded as analogous to that of a merchant whose stock has been destroyed, and who has been compelled to buy new stock in a rising market. Although, undoubtedly, he suffers a loss in consequence of this, he can have no claim against his insurers for that loss, seeing that the amount which the company is liable to pay is based on the market prices ruling at the time of the fire. It is the same in the case of machinery. The only basis of valuation consistent with paying nothing more than a full indemnity is the price which the insured would have received had he sold the machinery on the day of the fire, or the cost to restore the machinery to the condition it was in at the time of the fire. To pay more than that under the policy would be to give him more than a full indemnity. A fire policy, it should be kept in mind, relates only to some physical object capable of being damaged or destroyed by fire, and it is the *direct* loss to the insured through the damage or destruction of that object which is covered by the policy measured by its actual and intrinsic value on the day of the fire. If the machinery is wholly destroyed, the company is liable to pay the market value of the machinery as it was at the time of the fire; or if the machinery is damaged but not wholly destroyed, to pay the cost of restoring the machinery to the condition it was in at that time. With

[1] See supra, page 34.

machinery, as with any other class of property, the value which the fire has destroyed—the actual intrinsic value—is the measure of the insured's loss.

3. In the case of a *stock* loss a distinction is made between cost price and selling value. A commodity possesses a different value according to whether it is in the hands of a manufacturer, a wholesale merchant, a retail dealer, or the private consumer. and the basis for ascertaining the value at the time of the fire in the case of a loss on stock will depend upon which of these categories the insured comes under. But the price to a buyer is different from the cost to the seller, since in each case the price charged to the buyer includes the seller's profit. The manufacturer's price to the wholesale merchant includes the various costs and charges incurred in producing the article, plus the manufacturer's profit; the merchant's price is the cost of the article to him plus his charges and profit, and similarly with the retail trader's price to the private buyer.

A fire policy does not include prospective profit, *i.e.*, the profit which will be earned on the sale of the goods. Under whatever category the insured falls, therefore—whether manufacturer, merchant, or retailer,—the indemnity to which he is entitled cannot include anything by way of profit, since as the goods have not been sold at the date of the fire no profit has been earned on them, and consequently, in ascertaining the value for the purposes of indemnity, the cost price alone must be

considered. In the case of a manufacturer that will be the cost of production, not what it originally cost to produce the article, but what it will cost to produce it *on the day of the fire*, and in the case of a wholesale merchant and trader, the cost price will be the price at which *on the day of the fire* the goods could have been supplied by the previous seller.

In the case of goods invoiced to a buyer but not paid for, the basis of value is invoice price. Various considerations, however, govern the position in the case of goods of this description. There is first the question as to who has the property in the goods—the seller or the buyer. This will be governed by the Sale of Goods Act.[1] If the property—or the legal ownership—in them still rests with the seller, he is entitled to be indemnified under his policy on the basis of the invoice value, seeing that his profit on them has been earned, and consequently their value to him is something more than the bare cost of production. However anomalous that may appear—inasmuch as had the property in the goods passed to the buyer, the loss would still have been paid on the basis of invoice value, assuming there had been no reduction in the price in the interval,—the anomaly is more apparent than real. The seller suffers a direct loss to the extent of the invoice value. The fire has prejudiced him to that extent, since it has deprived him of a benefit which he had actually derived from the sale—not a prospective benefit, but an

[1] See supra, page 187.

existing one. A different rule may apply, however, where owing to a reduction in production costs the price of the goods at the time of the fire is below the original invoice price. In that case if the insured could invoice other goods of the same quality and description to replace those which had been destroyed at less than the original invoice, to pay him on the basis of the original invoice would be to indemnify him in excess of his loss. It is not sufficient to argue that the value of the goods to the insured is the price at which he sold them, for if he can replace the goods the measure of his loss is the cost of replacing them, plus his earned profit. In the case of a merchant or dealer, on the other hand, the value of the goods to him is their actual value at the time of the fire, the price, *i.e.*, at which other goods of the same quality and description would have been invoiced to him on the day of the fire. If that is less than the price he originally paid for them the loss arising from the fall in value is a trading loss, and one which he would have incurred in spite of the fire. Where, however, goods have actually been sold, the element of speculation no longer exists. The seller has earned his profit, and if the goods are at the seller's risk at the time of the fire, he is entitled to have his profit included in the value of the goods.

It should be noted that if the invoice price includes any charges, such as carriage or cost of marketing, which do not fall to be paid until the goods are delivered or marketed. these charges are

excluded in ascertaining the value. *E.g.*, if goods are invoiced at "carriage paid" price and are destroyed while in the seller's warehouse, the charges for carriage have not been incurred, and consequently cannot form a component part of the price.

Where the property in the goods has passed to the buyer, but the seller has contracted liability for them as long as they remain in his custody, no question can arise as to the amount recoverable. The seller is entitled to be indemnified under his policy to the extent of his liability. A difficulty may arise, however, if at the time of the fire the seller's liability happened to be in excess of the market value, as might be the case if he had contracted to keep the goods insured for the amount of the invoice, and had actually insured them to that extent. If the policy specifically stated that in no case was anything beyond market value covered, the position would be clear; but if the insurance applies to "stock in trade, the property of the insured, *or for which he is responsible*," the question to be decided would then be whether the company was bound by the insured's contractual obligation to insure the goods for their invoice value, or whether the reference to invoice value was to be regarded as merely fixing the *limit* of the insured's liability, which under no circumstances could exceed market value. So far as the position between the insured and the company is concerned, if the latter paid on the basis of invoice value, disregarding the actual market value, no

question of any violation of the principle of indemnity could arise, since all that the insured would recover would simply be an indemnity to cover his liability to the buyer, provided, of course, there is no question of collusion between seller and buyer to defraud the company. and provided also that the buyer could enforce the terms of the contract and hold the seller liable for the invoice price, notwithstanding any fall in the market price.

Where an article has a market price—*i.e.*, the price obtained for it in the open market as distinguished from a proprietary article, the price of which is fixed by the producer,—the basis of adjustment is the market value on the day of the fire. Thus, if the price of hay at the nearest market is, say, £5 per ton, a farmer would be indemnified under his policy on that basis. Notwithstanding that he would thus be paid the selling price (less marketing and other charges not incurred) this would not be inconsistent with the principle of indemnity, because in order to replace the hay which had been destroyed he would require to buy in the open market and pay the market price for other hay. In being paid the market price, therefore, the farmer is recovering no more than a full indemnity. The same applies in the case of any merchant or dealer who trades in a commodity, the price of which is controlled by the market quotations.

The objection might be made, however, in the case of an insured who is a manufacturer as well

as a merchant, that by being paid the market price for stock which is not invoiced, he is recovering more than his actual loss, since presumably the market price, which would have been the price at which the goods would have been invoiced if sold, includes a profit to him. The better course, it might be contended, would be to adjust the value of such stock on the basis of cost of production, since the insured being in a position to manufacture other goods to replace those destroyed, is not compelled to buy in the open market. To be consistent, however, would not the same method for ascertaining the value require to be adopted where the market value had fallen below cost price? In which event, if the loss were adjusted on the basis of cost of production, the insured would be indemnified in excess of his actual loss, since he would then recover more than the price of the goods in the open market.

The root principle of a contract of fire insurance is indemnity, or to express it in another way, the contract aims at putting the insured as near as possible in the same position in which he stood at the time of the fire, and so long as it results in nothing more than that it cannot be of much material importance what basis is taken for adjusting the loss. The tendency now is to place a broader interpretation on indemnity than formerly, as is illustrated by the issue of contract price policies. These policies are intended to protect an insured who has contracted to supply goods at a fixed price, against the loss he would incur if the

contract was broken by reason of a fire destroying the goods whilst still in his custody. By the special clause—known as the contract price clause [1] —attached to the policy, the company's liability is shifted from market value, and is based wholly on the price at which the insured had contracted to supply the goods. The idea underlying an insurance of this description seems to be that as the insured has sold the goods in advance at a fixed price, he is in the same position in respect to the loss which he would sustain by a fire, as a manufacturer who had invoiced finished goods to a buyer. A fire would deprive him of the direct advantage which he is deriving from the contract. The measure of his loss is the loss of the contract, and consequently, he is entitled to be indemnified on that basis. The essence of the whole matter, of course, and what preserves the principle of indemnity inviolate, is that the fire must have the immediate effect of cancelling the contract. If it did not have that effect, then the basis of adjusting the loss would revert to market value.[2]

A loss on *rent* is usually adjusted on the basis of the sum insured on rent, or the actual rental

[1] The clause reads in the following terms:—

"It is hereby agreed and declared that in respect only of goods sold but not delivered for which the insured is responsible and with regard to which under the conditions of the sale the sale contract is by reason of the fire cancelled, either wholly or to the extent of the loss or damage, the liability of the company shall be based on the contract price, and for the purpose of average the value of all goods to which this clause would in the event of loss or damage be applicable shall be ascertained on the same basis."

[2] See further, chap. xvii.

value of the property, whichever of these is the lesser. The company's liability for rent is limited to the period during which the building is untenantable owing to the fire, but not for any loss of rent due to unnecessary delay in restoring the damage. The rent clause provides that the company will indemnify the insured for loss of rent for the period between the date of the fire and the restoration of the building, or the time within which the building "with due diligence" could have been restored, but not exceeding the period for which the rent is insured. That is usually twelve months, but it may be less or it may be more than twelve months. In practice the length of time likely to be required for reinstating the building to make it tenantable is usually agreed upon between the assessor and the insured's architect. This gets the rent claim settled forthwith instead of being held in abeyance until the damage has actually been restored. If the time necessary to reinstate the building is less than the period for which rent is insured, the amount recoverable will be the proportion of the sum insured on rent (or the actual rental value of the building) which the time required for restoration bears to the period for which the rent is insured, provided the rent condition bears that out, otherwise the whole amount insured on rent might be held to apply to any period of unoccupancy up to the twelve months.[1]

Although the rent clause refers to the *building*

[1] See *Buchanan* v. *Liverpool & London & Globe* (1884),—a Court of Session case, where this point arose.

being rendered untenantable by the fire, this does not preclude the insured from recovering loss of rent for a *part* of the building, whether it be in multiple tenure or occupied by one tenant. In such cases the insured would be entitled to be indemnified for the loss of rent arising from the part affected. In adjusting a claim for loss of rent, it is necessary to ascertain whether rent is not also included under a loss of profits policy as one of the standing charges, as is not unusual, in which event the loss would be allocated to both policies.

The rent usually covered by a fire policy is the rent which the building yields as a building—*i.e.*, the fixed charge paid in return for the use of the building. The object of the insurance is to relieve the proprietor of the loss of rent that would ensue upon a fire rendering the building unfit for occupation; or, where the tenant is still liable for the rent notwithstanding that he is not able to occupy the building owing to the fire, to relieve him of that liability; or again, if the proprietor himself is the tenant, the insurance which he has effected on rent will enable him to pay the rent of temporary premises which he may require to rent until his own are habitable again. A rent insurance, therefore, is intended to cover the loss of rent to the proprietor of the building in consequence of a fire rendering the building unfit to be used, or to relieve the tenant of his liability for the rent during the period he is unable to occupy the building as a result of a fire. But in addition

to the rent derived from the use of the building, there is also in some cases a rent derived by the occupier from the purposes for which he uses the building. Thus, if the building is occupied as a hotel or as a public warehouse, the tenant in both cases charges a rent to third parties—in the former for the accommodation he provides for his guests, and in the latter for warehousing goods belonging to others. In both these cases, however, the rent charged is the source from which the profit earned by the particular business carried on is chiefly derived, and as a fire policy does not cover unearned or prospective profit, such rent is not insurable under a rent insurance taken out in the ordinary terms. If it is insured at all, it is usual to include it under a loss of profits policy.

Ex Gratia Payments.

An *ex gratia* payment may be defined as a payment made under the policy but not under the contract. It is essentially gratuitous—a payment, *i.e.*, in respect of an event for which no provision was made in the contract and for which no premium was paid. The loss in respect of which the payment is made is either not covered by the policy, or is one which the insured is barred from recovering owing to a breach of one of the conditions of the contract. In both cases—or it may be for some other reason—there is no legal obligation on the part of the company to make any payment; but if, notwithstanding this, the company decides to admit the claim it does so *ex gratia*.

Ex gratia payments may be objected to on grounds of equity—as being unfair to the rest of the policy-holders, since the funds which these have subscribed in order to furnish security for themselves are being gratuitously disbursed to pay losses they were never intended to pay. The objection, however, is perhaps more academic than practical. An *ex gratia* payment as a rule is only made in cases where to withhold payment would inflict undoubted hardship on the insured. If the insured has suffered a *bona fide* loss but is unable to recover his loss because of some technical flaw in the contract, or because of some innocent misunderstanding or omission on his part, under such circumstances a company may be justified in meeting his claim *ex gratia*. The whole question of *ex gratia* payments, however, demands most careful consideration, for if it became the practice to make such payments promiscuously they might well be taken exception to on ethical as well as economic grounds. An *ex gratia* payment would not be justified that tended to weaken the fundamental principles of good faith and indemnity, for then it would become a menace to the ethics of fire insurance—as might be the case if the companies paid claims which although not questionable are extravagant, or were never intended to be covered by the policy. It would be equally unjustifiable to make *ex gratia* payments if these had the effect of increasing the loss and wastage caused by fire, as might happen if the companies ignored the policy condition against increase in

risk without notice. An *ex gratia* payment cannot be used to defeat any fundamental principle of a fire insurance contract, or to evade any special provision contained in the contract. It is scarcely likely, *e.g.*, that a company would pay *ex gratia* anything in excess of the actual loss, or relieve the insured of any part of the loss which fell upon him by the special terms of the policy; nor would a company pay *ex gratia* something which it was clear the insured never intended to insure. Another objection that might be made to *ex gratia* payments is the effect these might have on the loss ratio. Fire insurance premiums are paid to secure indemnity for loss as provided by the contract; they furnish the resources which enable the companies to fulfil their contracts with the insured, and are adjudicated wholly on the liability arising out of these contracts. Consequently, if it became the practice to pay claims that were not contemplated by the contract or provided for when the premium was arranged, it is not improbable that the premiums hitherto charged would be found to be insufficient and would require to be increased. This would be inequitable to the general body of policy-holders, who would then be taxed to meet the extravagant claims of certain of their number.

Notwithstanding these objections, however, so long as *ex gratia* payments are made with discrimination, and after due consideration has been given to the special circumstances of the case, they may be regarded as perfectly legitimate transactions; they

were held to be so by the court in the case *Taunton v. Royal Insurance Company* (1864)—known as the *Lottie Sleigh* case.[1] The *Lottie Sleigh* was a ship lying in the Mersey with a quantity of gunpowder on board. The gunpowder exploded, and considerable damage, chiefly breakage of glass, was done to property in the neighbourhood by the concussion. The company elected to meet the claims for this damage by *ex gratia* payments, but a shareholder raised an action to restrain it from doing this. The courts, however, gave judgment in favour of the company, on the grounds that the payments were of the nature of an expenditure on advertising made in the interests of the ordinary business of the company, and falling within the discretionary powers vested in directors.

When an *ex gratia* payment is made, nothing should be done that would destroy the *ex gratia* nature of the transaction. It is a voluntary act on the part of the insurers, and no consideration should be taken in return for it. For example, if owing to the fire risk having been increased without the company's sanction, the policy was void at the time of the fire, but the company elected to waive the breach of condition and pay the loss *ex gratia*, it would destroy the *ex gratia* nature of the payment if the company demanded or accepted payment of the additional premium which would have been required had the change in risk been intimated at the time. The essential characteristic of an *ex gratia* payment is that it is not a payment

[1] See supra, page 57.

made in return for some consideration received; it is a gratuitous payment, made at the pleasure of the company and as an act of grace.

Payment of a claim *ex gratia* does not fix liability on the company for a future loss occurring under similar circumstances, and in order that there may be no question as to the nature of the payment made when a claim is settled *ex gratia*, the loss receipt should show that the payment is made without admission of liability, and is not a payment in satisfaction of any legal claim which the insured has under the policy. The insured should be made clearly to understand the true nature of the transaction. A loss discharge is usually taken in common form :—

"Received from the . . . Insurance Company the sum of . . . in full discharge of my claim for loss and damage in consequence of fire on or about the . . . day of . . . to property insured under Policy No. . . . &c."

This form of receipt, of course, is in satisfaction of the insured's legal claim under the policy; but if an *ex gratia* payment is made, obviously some modification is required, say, as follows :—

"Received from the . . . Insurance Company the sum of . . . *being an* ex gratia *payment under Policy No. . . . in respect of loss and damage which occurred on or about the . . . day of . . . &c.*"

A payment made *ex gratia*, it should be noted, does not subrogate the company to any rights which the insured may possess against a third

party primarily responsible to him for the loss.[1] Nor can a company *legally* claim relief from its reinsurers under a reinsurance contract for an *ex gratia* payment, although in practice the strict legal position is not usually adhered to.[2]

Extinguishing Expenses.

Whether the expenses incurred by the insured in extinguishing a fire form an item of his claim against the company seems to be doubtful. It is expected of the insured that not only will he exercise all reasonable care to prevent an outbreak of fire, but that when a fire does break out he will take all the measures necessary to have it extinguished. This is a duty laid upon him, for the insurers have a right to expect that the insured will not—either by anything he does, or by anything he omits to do—increase their liability beyond what was understood. If the insured fails to perform these duties his right of recovering under the policy may be prejudiced if his action amounted to wilful neglect or carelessness, for he would then be guilty of a breach of the duty of good faith implied in the contract. The duty imposed upon him requires also that he will do whatever is possible in other ways to minimise his loss—*e.g.*, by removing out of danger such of the property as the fire has not affected, and protecting from further damage goods that may have been damaged.[3] The ex-

[1] See supra, page 181. [2] See infra, page 361.

[3] See supra, page 121. "The Sue and Labour Clause" in a marine policy provides for payment of the charges incurred in

penses incurred by the insured in these salvage operations are included as part of his claim under the policy, and any damage the property may suffer through these operations, although it may not have been directly affected by the fire, is also included—all, however, within the limits of the sum insured on the property, for in no case can the company be called upon to pay more in respect of the fire than the sum insured.

The companies, however, do not all adopt the same attitude with regard to extinguishing expenses. Generally speaking, these expenses are not regarded as an item of the claim—especially if they are for voluntary assistance at the fire,—and are paid outside the contract. It is the practice with some of the companies to pay these charges whether the sum insured is exhausted by the principal loss or not, while with others if the loss is total under the policy no payment is made in respect of extinguishing expenses. This does not seem logical if these expenses are regarded as not falling within the scope of the contract. To decline to pay anything for extinguishing expenses because the sum insured is exhausted seems to be tantamount to admitting that they *are* covered by the

"the defence, safeguard and recovery of the said goods and merchandise and ship" when a loss arises, and these are paid irrespective of whether the loss is total under the policy or not (sect. 78 (i), Marine Insurance Act, 1906). Sub-section 4 of the same section provides that: "It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss." The same duty is implied in fire insurance.

policy, else why plead that there is nothing available under the policy to meet them?

Powers to provide and maintain a fire brigade service are conferred upon certain local authorities by various statutes. Some of these statutes are general,[1] and apply to such local authorities as (in England) urban and rural district councils and parish councils, and (in Scotland) to county councils and burgh commissioners; others are local or private acts, such as those for London, Liverpool, Manchester, Glasgow, and Edinburgh, to mention a few. Generally these various statutes, both general and local, give powers to the local authorities to "purchase or provide such engines for extinguishing fire, and such water-buckets, pipes, and other appurtenances for such engines, and such fire escapes and other implements for safety or use in case of fire, and may purchase, keep, or hire such horses for drawing such engines, as they think fit, and may build, provide, or hire places for keeping such engines with their appurtenances, and may employ a proper number of persons to act as firemen, and to be named the fire brigade, and may appoint a firemaster, who may be the chief constable, and who shall be the superintendent of the

[1] The following general Acts applicable to England deal with Fire Brigade Service:—

Local Government Act, 1894; Public Health Act, 1875; Lighting and Watching Act, 1833; Town Police Clauses Act, 1847; Poor Law Amendment Act, 1867.

The general Acts for Scotland are:—

Local Government (Scotland) Act, 1908; Burgh Police (Scotland) Act, 1892.

fire brigade, and may provide suitable dwellings for such firemaster and firemen, and make such rules for their regulation as they think proper, and give such firemaster and firemen such salaries and such rewards for their exertions in cases of fire as they think fit" (to quote sect. 291 of the Burgh Police (Scotland) Act, 1892).[1] The statutes giving these powers to local authorities also empower them either to combine with other local authorities possessing similar powers for the maintenance of a joint fire brigade service, or to contract with some neighbouring authority whereby the brigade maintained by the latter will be regularly available for use within the district of the authority making the contract. ". . . a county council may enter into an agreement with the town council of any burgh or police burgh or with any other county council for making the fire engines belonging to such county or town council, with their appurtenances, regularly available for use within the county or any district or special district thereof, or burgh or police burgh, on such terms and subject to such conditions as shall be specified in the agreement." (Sect. 8 (2), Local Government (Scotland) Act, 1908.)

It should be noticed that there is nothing of a compulsory nature in any of the existing statutes, it being left to the local authorities themselves to make provision for extinguishing fires within their respective districts, or not, according to their own

[1] See also the provisions of the Metropolitan Fire Brigade Act, 1865.

choice; nor in the absence of any contract or agreement is a local authority under any obligation to send its brigade outside its own boundary—to what are usually spoken of as "out-of-district" fires—if it does not choose to do so. Speaking generally, where a local authority exercises its powers, the expenses in connection with the maintenance of the brigade, including the charges for attendance at fires within its own jurisdiction, fall wholly on the rates, except where there are special powers under a private Act to charge the individual—either the owner or occupier of the building in which the fire breaks out, or as otherwise provided for in the special Act [1]—for the services of the brigade. In the absence of such special powers, however, a local authority cannot charge any portion of the expenses against an individual where these are incurred in connection with fires within its own district, but if the brigade attends at an out-of-district fire, the expenses, according to statute, are to be defrayed by the owner or occupier of the building in which the fire occurred, unless where there is an agreement between the two authorities for the common use of the brigade, in which case the expenses will be defrayed as provided for by the special Act applying.

A fire brigade established under statutory powers is given certain rights for the proper conduct of their operations at a fire. Thus, Section 293 of the

[1] Different Acts make different provisions, both as to what expenses are to be charged and as to the persons who are to defray these.

Burgh Police (Scotland) Act provides: "The fire brigade may enter, and, if necessary, break into any building in the burgh being on fire, or any buildings or lands adjoining or near thereto, without the consent of any owner or occupier thereof respectively, and may do all such acts and things as they may deem necessary for extinguishing fire in any such building, or for protecting the same or rescuing any person or property therein from fire; and any damage done in the exercise of such powers shall be deemed to be damage done by fire." And Section 294 of the same Act provides: "The senior officer of the fire brigade present at any fire shall have the sole charge and control of all operations for the extinction of such fire, whether by the commissioners' engines or appliances, or any other or others, including the fixing of the positions of fire-engines and apparatus, the attaching of hose to any water-pipes or water supply, the shutting off the water from other parts of the building on fire or of adjoining buildings against which the water is to be directed." Other statutes which deal with the extinction of fire contain similar provisions—see, *e.g.*, the Public Health Acts (Amendment) Act, 1907, sections 87, 88, and 89, and the Metropolitan Fire Brigade Act, 1865. In certain large cities—London, Liverpool, and Glasgow, *e.g.*—the fire insurance companies, at their own expense, maintain an organisation of salvage men, colloquially referred to as the "salvage corps," whose duty it is to attend at an outbreak of fire and carry out

salvage operations—*i.e.*, saving property from the fire and removing and protecting it from danger. The Metropolitan Fire Brigade Act specifically empowers the fire insurance companies insuring property in the metropolitan area to maintain a corps of salvage men, and the fire brigade are required to give facilities to these men for carrying out their duties, which obviously are of considerable importance from the point of view of minimising the loss to the insured.

It will be observed that where the local authority has powers to charge for attendance at a fire, the charge in the majority of cases is made against the owner or occupier or both of the building *in which the fire broke out.*[1] Although adjoining property may be involved, or in danger of being involved, in the fire, the owners and occupiers of such property are not required to contribute anything towards the expenses, notwithstanding that they are benefiting by the services of the brigade.[2] But while this is so in theory, it has become established practice where a local authority has statutory powers to charge for the services of its brigade, for these charges to be paid by the companies—those insuring the property affected by the fire, and those insuring any property which, although not actually involved in the fire, is within risk of it,—

[1] See, *e.g.*, sect. 30 of the Metropolitan Fire Brigade Act.

[2] Certain private Acts, however, provide that proprietors of property endangered by the fire shall bear a proportion of the expenses.

the charges being allocated *pro rata* on insurances, thus :—

A company insures		£10,000	on building.
B "	"	5000	on contents.
C "	"	15,000	on building and contents of adjoining property within risk.
		£30,000	

Extinguishing expenses—£50 (including gratuities to voluntary assistants).

Apportionment :—

A company pays $\frac{10,000}{30,000}$ of £50.

B " " $\frac{5,000}{30,000}$ of £50.

C " " $\frac{15,000}{30,000}$ of £50.

In the case of farming losses, the expenses are allocated to the policy covering the contents of the farm on the basis of *values at risk*, the building policy paying on the basis of the sum insured, and the same applies in the case of floating insurances. Obviously, it would not be equitable in such and other cases of a similar nature to base the allocation of the expenses on the sum insured, since the whole sum insured may not be subject to the same risk, and consequently, where this is the case, the value of the property actually within risk of the fire is taken as the basis of allocation.

Where the sum insured is inadequate the question arises whether the insured should be brought in to bear a share of the extinguishing expenses. Being under-insured and consequently in risk of suffering a loss in excess of what can be recovered under the

policy, the insured has more than the ordinary concern of a prudent person that the fire should be checked and extinguished as speedily as possible, for the narrower the limits within which the fire can be confined, the less will he personally lose. It is not the insurers alone who are benefiting by the efforts to extinguish the fire. The insured's loss is being minimised also, and consequently it might be considered that he ought to bear a share of the extinguishing expenses along with his insurers in proportion to his uninsured interest.

But although it might reasonably be regarded as inequitable under such circumstances for the whole of the expenses to be borne by the insurers, if the insured declined to contribute any share of these and he had no statutory liability in the matter—as would be the case if he was the occupier only and the owner alone was liable under statute to pay the brigade charges—there would be no means of forcing him to pay anything towards the expenses. If he had not been insured at all he could not, in the absence of any statutory provisions, be charged with any part of the expenses, and the fact that he is insured, but not adequately, does not alter the situation. It might be different if he had a statutory liability for the expenses. Except in the few cases where a local Act imposes a liability on the companies for the brigade charges either in whole or in part, any payments which the companies make towards the expenses incurred in extinguishing a fire are *ex gratia* in nature,

and intended to relieve the insured of his statutory liability for these expenses. If, therefore, the insured is not fully insured, there would seem to be no adequate reason why he should not contribute to the expenses in proportion to his uninsured interest. But although it may appear illogical for the insured to be relieved of the whole of his statutory liability, notwithstanding that he is his own insurer for a part of the value at risk, yet as these expenses are paid by the companies *ex gratia* and not under their contract with the insured, any exception that might be taken to the companies making such payments could also be taken to any other form of *ex gratia* payment.[1]

But apart from any question as to whether an insured who is under-insured should bear any share of the extinguishing expenses, the subject generally requires to be considered in relation to the cost price of fire insurance. If the companies, in addition to paying the ordinary fire losses are required to bear the expenses incurred in extinguishing fires, the selling price of fire insurance would require to be fixed so as to make provision for these additional outlays, for whatever is paid out by the companies must in the long-run come out of the pockets of the policy-holders. If it became settled policy, therefore, to charge the insurance companies with the expenses of extinguishing fires, not only would the cost price of fire insurance increase—with an inevitable increase in the selling price to meet the increased cost,—but

[1] See supra, page 335.

in addition to this the whole charges of maintaining a fire brigade organisation would fall upon a certain section of the community, who, because of their prudence and foresight in protecting themselves against loss by fire, would thus be taxed to pay for benefits in which the whole community are participating. This, obviously, would be an unsatisfactory state of things, and one to which both the companies and their insured could reasonably take exception.[1]

[1] In their Report, recently published, the Royal Commission on Fire Brigades and Fire Prevention express the opinion that the proposal that insurance companies should subsidise fire brigades by direct contributions cannot be regarded as within the sphere of practical politics; neither, in the opinion of the Commission, does such a proposal appear to be theoretically justifiable.

CHAPTER XVI.

1. LIMITS OF VALUE: 2. REINSURANCE.

1. *Limits of Value.*—Under ordinary circumstances a company is liable under its policy for the amount of the loss, but not exceeding the sum insured. By a special provision in the policy, however, the company may restrict its liability in respect of certain kinds of property to a specified amount. Thus, in the case of an insurance over the contents of a dwelling-house, it is the custom to specify an amount as the maximum which can be recovered in respect of pictures and prints. Where horses and cattle are insured, a limit of value is put upon any one animal; and similarly in the case of such articles as plans, models, moulds, patterns, designs, and illustration blocks and plates, the policy specifies the maximum amount recoverable for any one of these things. In more or less varying phraseology the policy states that in case of loss no one picture, print, pattern, &c. (as the case may be) is to be deemed of greater value than a specified sum. This does not mean, of course, that when a loss arises the specified amount will

be paid. The special provision of the policy relating to property of the description referred to is intended to place a maximum of value on such property; but in the event of a fire the loss will be ascertained in the first instance by the ordinary rules—*i.e.*, on the basis of actual value at the time of the fire. If the loss so ascertained exceeds the limit of value stated in the policy, the company will not be liable to pay more than the limit, irrespective of the sum insured by the item affected, since the limit of value is the whole amount available to meet the loss on any single picture, print, animal, &c. If the policy stated that "in case of loss no one picture or print is to be deemed of greater value than £50," and a picture is damaged to the extent of £30, the company would pay the amount of the loss. But if the damage amounted to £60, all that the company would be liable for would be £50, that being according to the policy the maximum value of any one picture. Similarly, if horses are insured for £1000, with a limit of £200 on any one horse, and an animal valued at £300 is destroyed, the company would be liable for £200 only, but if the horse was worth £100 the company would be liable for that amount. If more than one picture, or more than one horse, &c., is destroyed, while the liability under the policy would be determined by the loss sustained up to the limit of value, the aggregate amount payable for the whole loss could not, of course, exceed the total sum insured. Thus if, say, copper plates were insured for £100, with a limit of £10

on each, and all were destroyed, in no case would the company pay more than the sum insured on these—viz., £100. The limit does not represent the sum insured on each individual article, but the maximum amount which can be claimed in respect of any one.

The property to which these limits apply is either of a special nature, with a special value not always governed by the ordinary rules of value, or is of such a nature that even a minor outbreak of fire may result in a serious loss, not only because it is susceptible to damage, but also because the salvage from such property would be of little or no value. A picture, *e.g.*, might easily become a total loss by a fire that would cause comparatively little damage to a piece of furniture, and if a fire broke out in a farm-steading, while it is reasonable to expect that there will be a certain value in the salvage from the dead stock, the live stock in all likelihood will prove a total loss. In determining the amount it is prepared to underwrite on a risk a company will, therefore, take into consideration what the consequences of a fire are likely to be, and how far its liability is likely to be diminished by the salvage from the fire. This is given effect to in practice either by limiting the maximum liability—*i.e.*, by fixing a limit of retention according to the nature of the risk, or by placing a limit on the amount that can be recovered in the event of a fire.

The practice of placing a limit of value on certain kinds of property tends also to prevent under-

insurance, and in this it serves a purpose similar to the application of average, for if any of the property affected by the limit is of greater value than the limit of value allowed by the policy, these to be fully covered would require to be insured by separate items. Thus, under a household goods policy containing a picture limit of, say, £50, a picture worth £100 would only be covered for 50 per cent of its value, and unless the insured is content with a partial indemnity in the event of a fire destroying the picture, he would be compelled to insure it for its proper value under a separate item. This has the effect of producing a premium more appropriate to the liability than would otherwise be the case, for if no limit appeared on the policy and pictures were insured—as they usually are—in one amount along with the other contents of the house, the company would be liable for the full loss on the picture up to the total sum insured by the policy, notwithstanding that the sum insured might not be adequate to cover the whole contents. The company would then be incurring a maximum liability for a minimum premium, and the loss ratio would suffer in consequence. In this way—by restricting the company's liability, or alternatively, increasing the premium yield by compelling the insured to maintain a full insurance—a limit of value has the same influence on the loss ratio as that produced by the application of average.[1] Moreover, where patterns, designs, illustration blocks and plates,

[1] See supra, page 252.

and other articles of a similar nature are concerned, the practice of placing a limit of value on these is something akin to fixing their value in advance, and when a loss occurs the only question to be determined is whether the actual value of these articles exceeds the limit or not. This goes some way towards disposing of differences of opinion on the question of value, which might prove a difficult point in the adjustment of a loss if the policy did not specify the maximum value to be placed upon property of that description. It is of little consequence, then, how exaggerated the insured's idea of the value may be. At the most he cannot recover more than the limit.

2. *Reinsurance.*—The sum insured stated in the policy is the company's maximum liability to its insured, and in the event of a total loss—*i.e.*, where the property has been entirely destroyed—it will be liable for the whole sum insured, provided the loss is to that extent. Even where the fire has resulted in a partial loss of the property, the company may still be liable to pay the whole sum insured, as would happen if the property had not been fully insured; but when the loss is partial under the policy—*i.e.*, where the sum insured is not exhausted by the fire—the company is liable for the actual loss sustained by the insured.

It does not necessarily follow, however, that the loss which the company is liable for under its policy will ultimately fall entirely upon itself. If that were so, the consequences to the company in many cases would be extremely embarrassing. Although

a company is liable to its insured for a total loss under a policy for, say, £20,000, this does not mean that the entire loss is being paid by the company alone. In all probability only a fraction of the amount represents its actual, or *net*, loss, for every fire insurance company fixes a limit to the amount which it considers prudent to lose by a fire, so that no matter how serious the fire may be, or the extent of its liability under the policy, the company knows that it cannot lose more than the amount which it has fixed as its net "retention" on any particular risk. The companies apply the theory of fire insurance to themselves, and by reinsuring a part of their individual liabilities with other companies, distribute their individual losses. This is accomplished by reinsurance, or guarantee, transactions.

A reinsurance is a contract of insurance between two companies whereby one of them—the reinsuring company or the reinsurer—undertakes to insure the other—the insuring company or the reinsured—in respect of the liability which the latter has contracted towards its own insured. The insuring company has a direct liability to its insured, but it may reinsure a part of that liability with certain other companies, who become in turn insurers, or reinsurers, of the insuring company, and liable to it for a *pro rata* share of any loss which it may be called upon to pay under its own policy. The reinsuring companies are liable to the insuring company only; they have no liability to the latter's insured, who in turn has no remedy for

his loss against the reinsuring companies, for a reinsurance transaction is one between the company who has the direct liability to its insured and those other companies with whom it wishes to share that liability.

A reinsurance is effected either facultatively or under a treaty agreement, but most reinsurance business is now done by treaty. A facultative reinsurance is where the insuring company requests guarantee (or reinsurance) protection from another company in connection with a specific liability. The offer of the reinsurance is made to the reinsuring company by means of a *request note*, which sets out the main heads of the transaction—the name of the insured, the amount for which guarantee protection is requested, the sum insured by the insuring company on the property in connection with which the reinsurance is required, the risk covered, the duration of the reinsurance and of the original policy, and the amount which the insuring company retains as its net liability. If the reinsurance is one which the reinsuring company is willing to accept, it signifies this by the issue of a *take note*, which recapitulates some of the details of the request note; or pending the issue of a request note, temporary reinsurance protection may be obtained by means of a *reinsurance slip*, which the reinsuring companies initial for the amount they each accept. The reinsurance contract is completed by the issue to the insuring company of a stamped guarantee policy, which like the ordinary fire policy forms the legal instrument embodying the contract, and

is binding on both parties. It does not, like the ordinary fire policy, contain any description of the property to which the original insurance relates. This is not necessary, seeing that the guarantee undertaking is to insure a portion of the liability of the insuring company under the policy issued by it and specified in the guarantee policy. The original policy issued by the insuring company, and which the guarantee policy follows, is incorporated into the guarantee policy by the express words, "as per copy of policy or of the written portion or abstract thereof lodged," &c.

A reinsurance, although it is a contract between two insurance companies, is none the less a contract of fire insurance governed by the same ruling principles as govern any other fire insurance contract. It embodies the principle of indemnity, for since it exists for the purpose of relieving the insuring company of a part of the liability which it has contracted with its insured, if for any reason the original policy issued by the insuring company becomes inoperative, and no liability attaches under it in consequence, the reinsurance becomes inoperative also; for if the insuring company has no liability under its policy there is nothing to which the reinsurance can apply. The insuring company can only enforce the reinsurance contract against its reinsurers when its own contract with its insured can be enforced against itself. A reinsurance, like any other fire insurance contract, requires an insurable interest to support it. The insuring company has no proprietary interest in the property

which forms the subject-matter of its own policy, its interest rests upon the liability which it has undertaken in connection with it, and it is this interest which entitles the insuring company to insure its liability under a reinsurance contract.[1] Consequently, if its interest in the property ceases, as would happen if its policy lapsed, the reinsurance would terminate, for the reinsurance follows the interest which the insuring company possesses in the property in respect of its liability under the policy specified in the reinsurance contract. Further, a reinsurance contract implies the observance of the duty of good faith. The position in relation to the rule of good faith between the insuring company and its reinsurers is the same as that between insured and insurer under an ordinary contract.

The reinsuring company has no other means of getting information about the risk than from the insuring company, and it assumes that the particulars which the insuring company has supplied are as full and complete as its own knowledge of the risk goes. Moreover, the reinsuring company bases its acceptance of the reinsurance on the amount which the insuring company retains as its own share of the liability, for the amount retained is taken as indicative of the insuring company's estimate of the risk. Consequently, if the reinsuring company has been wilfully misled with wrong information about the risk, or a false statement of the insuring company's retention, that would be

[1] See supra, page 214.

sufficient to vitiate the reinsurance contract, although an innocent error or omission might not have that effect, provided the reinsuring company has not been damnified by it. Following upon this rule of good faith, if any material change is made on the original policy, or any material alteration made on the risk, either affecting the fire hazard or the location of the risk, notification of the change must be made to the reinsuring company; or if the insuring company modifies its retention this also must be advised to its reinsurers. The principle involved in this is the same as that applying to the original contract between the insuring company and its insured—viz., that nothing must be done unknown to the reinsurers which has the effect of prejudicing their position under the reinsurance contract.

A treaty reinsurance does not follow any particular liability, as in the case of a facultative reinsurance, but is a general agreement between two companies under which one—the treaty office—agrees to take up a certain proportion of the other's liability on all risks on which reinsurance protection is required. This is obligatory on the treaty company, and in this aspect of it a treaty reinsurance differs from a reinsurance placed facultatively, for in the latter case acceptance of the reinsurance proposal is optional on the part of the company to whom the reinsurance is offered. It need not accept it if it chooses otherwise. A treaty company, however, is bound under the terms of the treaty, as long as it remains in force, to take

up its agreed share on all risks where the insuring company desires reinsurance protection, unless the treaty agreement provides otherwise in the case of certain risks of a special nature. There is no formal offer and acceptance of the reinsurance, but as a rule the treaty office becomes "interested" for its share whenever the insuring company is committed to the risk. A treaty reinsurance is therefore placed automatically, and is arranged much more expeditiously than is possible with facultative reinsurances. A treaty reinsurance is favoured in preference to a facultative reinsurance, for it enables the insuring company to issue cover to its insured forthwith without waiting until it has arranged the necessary reinsurance protection.

In facultative reinsurances a guarantee specification is issued to the reinsuring company for each individual case. The specification contains the essential particulars of the original policy, the amount reinsured, the premium—or, as it is called, the "consideration,"—both present and annual, the amount retained, and the duration of the reinsurance, and it is from these particulars that the guarantee policy is prepared. This procedure, however, is dispensed with in treaty business, and instead, particulars of all the policies reinsured within a certain period are set out in what is known as a bordereau, which gives particulars of all the policies reinsured within the period, the amount ceded to the treaty company under each policy, the insuring company's retention, and the premium, or "consideration," for the reinsurance.

Reinsurance accounts for both treaty and facultative business are made up at stated intervals, and may include losses where the amount recoverable under the reinsurance is small. Other losses are recovered from the reinsuring companies immediately after the insuring company has discharged its liability to its insured on production of the loss papers and the insured's receipt. The reinsurers cannot interfere in the adjustment of the loss, and the insuring company is not obliged to confer with its reinsurers, although in the event of some point arising on a question of principle or the interpretation of the contract, or where any difference arises requiring a reference to arbitration, the insuring company may as a matter of courtesy confer with its reinsurers. All expenses in connection with the loss and forming a part of the loss are recoverable from the reinsuring companies. In this connection it should be noted that strictly speaking a reinsurance contract follows only the legal liability of the insuring company to its insured, and as has already been stated,[1] if the insuring company elects to make an *ex gratia* payment under its policy or go outside the scope of its contract, its reinsurers are not *legally* bound to follow it. In actual practice, however, this is not always insisted upon, and the insuring company may, at its own discretion, compromise with its insured where *ex gratia* treatment of the claim is justified.

A reinsurance contract can be terminated by the insuring company at any time during its cur-

[1] See supra, page 339.

rency. This follows from the nature of the contract, which is intended to relieve the insuring company of a part of its liability. Consequently, if its liability becomes reduced either owing to a reduction in the sum insured by the reinsured policy or owing to the cancelment or reduction of other policies over the same risk, there will be no further need for the reinsurance, which can be cancelled, and a return of premium allowed to the insuring company for the unexpired period of the reinsurance. The reinsuring company, however, cannot terminate its contract during currency, unless with the consent of the insuring company, and in the case of an annual contract if the reinsuring company does not intend to renew the contract it is usually required to give the insuring company notice to that effect thirty days before the renewal date of the original policy, in order to give the insuring company an opportunity of making other arrangements before the renewed date of the policy. The reinsurance runs concurrently with the original policy.

Various considerations will weigh with a company in determining the extent of its net holding, or retention, on a risk. First of all, it must have regard to its financial status. A company which has accumulated large reserves will carry larger retentions than one whose resources are more restricted, and who must of necessity proceed with caution and confine its commitments to more modest amounts. Self-preservation compels a company to a policy of this nature, for no office could

possibly hope to succeed which did not set some limit to its probable losses. A company's accumulated reserves are its sheet-anchor, but if its losses are swallowing up its premium income there is not much hope of its being able to build up sufficient reserves to enable it to weather a time of exceptional stress when the cost price of its business exceeds the selling price,[1] and such periods come to every company at some time or another in the course of its history. It is better to have a net premium income of £500,000 with a 50 per cent loss ratio, than a net income of double that amount with a loss ratio of 80 per cent; for if the expense ratio is added—say, from 30 per cent to 40 per cent,—in the one case there will be a trading profit, and in the other a loss.

But there are other things which the companies, both large and small, must take into account in fixing the amount to be retained on different risks and different classes of risk. Some of these are:—

1. *The Degree of Fire Hazard present in the Risk.*—An office will retain less on a manufacturing risk than on a tenement of dwelling-houses, for the chances of an outbreak of fire in the one are greater than in the other. In determining the amount to be retained on any particular risk, it is necessary to take into consideration the loss experience of its class, and in practice it is usual to fix the retention on a risk according to the class to which it belongs. Thus there may be one retention for a corn mill, another for a cotton mill, another for

[1] See supra, page 280.

saleshop risks, and so on, for the loss experience on these different classes varies; but it not infrequently happens that individual risks of the same class vary in the degree of fire hazard they contain, and consequently the retention is adjusted to the merits of the individual risk, being either above or below the limit fixed for the class, according to whether the individual risk is superior to the average risk of its class, or the reverse.

2. *The probable Effects of an Outbreak of Fire.*—A fire in some classes of risk will—other things being equal—result in a greater loss than a fire of the same dimensions in others. This is chiefly owing to the nature of the goods contained in the building. A fire in a drapery establishment, for example, will cause more damage to the stock than a similar fire would likely do in an ironmongery store, for drapery stock is more easily damaged by fire and more susceptible to smoke and water damage than hardware goods. A loss in the one, therefore, would be more serious than in the other, for besides there being a difference in the degree of natural fire hazard present in these two classes of risk, there is also a difference in the probable effects of a fire, and there will be a corresponding difference in the amount retained on them. The same considerations apply in relation to the question of *salvage.* If the goods are of such a description that little or no salvage would remain from a fire—flax and jute, *e.g.*,—this will be taken into account in determining the amount to be retained on the risk, for the loss to the company in the

event of a fire will obviously be more severe than would otherwise be the case, since whatever value the salvage remaining from a fire possesses goes to diminish the company's loss under the policy. For the same reason, if the insurance is mainly on buildings, a larger amount will be retained than where the insurance is for contents, seeing that, generally speaking, a fire causes less damage to the building than to the contents.

3. *Exposure Hazard.*—A risk may be eligible in itself for a full retention, but be exposed to the hazard of some adjoining risk, in which case it will be necessary to carry a smaller retention than would have been done had the element of exposure hazard been absent, and the same rule applies generally where the natural hazard of the risk is increased owing to the presence of other hazards constituting an accumulation in fire risk.[1]

4. *Fire-Extinguishing Appliances.*—In some cases the provision of fire appliances will affect the retention, for if a risk is adequately protected in this way, it is reasonable to assume that when a fire breaks out, with appliances immediately available to cope with the outbreak, the loss to the company will not be so great as it would be if there had been no appliances. This is particularly so in the case of sprinklered buildings, and, as a rule, a larger amount is retained on a sprinklered risk than on a non-sprinklered one. In some classes of risk—mansion-houses and large dwelling-houses, *e.g.*,—one of the main factors in determining the

[1] See supra, page 293.

amount to be retained is whether the risk is provided with appliances, or is within easy reach of a fire brigade. This is one of the reasons why the companies retain comparatively small sums on mansion-houses. They are not usually provided with anything like adequate fire appliances, having regard to the values at risk, and are, moreover, remote from a fire-brigade service. It does not necessarily follow that because a risk is equipped with adequate fire appliances, larger amounts are retained on it in consequence, although the fact that it is provided with such appliances is a feature in its favour. The rates charged are usually reduced by the discount allowed for these appliances, and it is not always a logical procedure to reduce the rate and at the same time increase the limit of retention.

This raises the question as to how far the amount retained on a risk should be dependent on the rate charged for it. A retention is fixed in some respects relative to the fire hazard, based on the experience of the class; so is the rate. It would appear to be a logical inference, therefore, that the retention should be in inverse ratio to the rate for the risk —the lower the rate, *i.e.*, the larger the amount retained, assuming of course that the rate is a fair representation of the fire hazard. That argument, however, is apt to lead to wrong conclusions. Why does a company differentiate in the amount to be retained on different classes of risk? Why, for example, does it retain, say, from £10,000 to £20,000 on a tenement of dwelling-houses, and con-

siderably less on the contents of a draper's shop or a mansion-house? It is not because of the rates charged for these, for the rate for a mansion-house is only slightly higher than that for a tenement risk, and in many cases they are the same, while the difference in rate between a dwelling-house and a draper's shop is not in the same ratio as the difference in the net retentions; nor is it because there are fewer outbreaks of fire in a tenement risk than in a mansion-house or draper's shop. There are probably more claims paid under a policy covering a tenement of dwelling-houses than under any other policy, but notwithstanding this, dwelling-house risks are regarded as gilt-edged business carrying large retentions, for an outbreak of fire in such risks very rarely results in a serious loss, whereas a fire occurring in a mansion-house or a drapery risk may very easily have serious consequences.

It is, therefore, not altogether the loss experience that governs the retention, as what is known from experience to be the probable effects of an outbreak of fire. If the conditions of the risk are such that a fire occurring will in all likelihood result in a serious loss, a limit must be fixed to the amount which the company will lose by the fire, for the first consideration is to confine the loss within limits that will not strain the resources of the company unduly, and this irrespective of the rate charged. If the rate is adequate it has no bearing on the net retention. Undoubtedly a larger retention will be held on non-hazardous

classes than on hazardous ones; but although the hazard of the former is lower than the latter, and the rates for the two are correspondingly different, a fire may result in as serious a loss on the one as on the other; but because an outbreak of fire is more remote and of less frequent occurrence in the one than in the other, a larger amount can be retained, for the chances of the company being called upon to pay a heavy loss are fewer. Moreover, it may happen that the actual experience of some classes of risk warrants an increase in the rate previously charged. That, however, does not necessarily mean that a company will modify its retention on the class in question, for the adverse loss ratio may be the result of numerous fires, none of which are individually important, but are sufficiently large in the aggregate to justify an increase in the rate.

The amount retained on a risk is based on the assumption that a fire will result in a total loss under the policy; but the majority of losses are only partial, with the result that in many cases the company's net liability for the loss seldom reaches the amount of the retention. If there had been no reinsurance, the policy would have been issued only for the amount the company could accept on the risk,—in other words, the amount of its net retention; and in the event of a partial loss under the policy it would have been liable to pay the whole loss. A reinsurance proceeds upon the basis that while the policy is issued for a stated sum insured, and the company is liable to its

insured to that extent, its actual liability is only a *pro rata* share of that amount, the balance being distributed *pro rata* among other companies by way of reinsurance. Strictly speaking, therefore, a reinsurance contract is intended to relieve the company of the balance of its liability in excess of what it could only have accepted had there been no method by which it could reinsure a part of the liability it had contracted under the policy.

It is, however, only when the loss is total that the insuring company pays the full amount of its retention; in the case of a partial loss it pays its *pro rata* share in the proportion which the amount retained bears to the total sum insured, thus:—

Sum insured	£20,000	Loss	£1000
A. insuring company retains .	£10,000	and pays ½ of the loss=	£500
B. reinsuring company accepts	5000	and pays ¼ of the loss=	250
C. reinsuring company accepts	5000	and pays ¼ of the loss=	250
Total	£20,000		£1000

The question might arise whether, since the loss is within the limit of the insuring company's retention—*i.e.*, the amount it was prepared to lose by the fire, and the amount for which it would have issued its policy had it not been able to obtain reinsurance protection,—it should not pay the whole loss itself and recover from its reinsurers only when the loss exceeds the amount of the retention—that is to say, before the reinsurance contract can operate the insuring company's retention should be exhausted by the loss, and the reinsurers would then come in to take up any balance of loss in excess of the retention. This would appear to be

more consistent with the primary conception of a reinsurance contract, which was meant to relieve the insuring company of such part of its liability as it considered more than was prudent to carry alone. However correct that may be in theory, in practice the reinsurers insure a *pro rata* share of whatever liability rests upon the insuring company under the policy issued to its insured, and this applies to partial losses as well as to total losses.

The reinsuring offices are liable under the reinsurance contract for the same proportion of the loss as they would have been had they been interested under direct policies. Thus, in the example given above, if B. and C. companies, instead of being reinsurers of A., had been co-insurers with that company, they would each have been liable for a ratable proportion of the loss, and paid to the insured the same amount as they are paying to A. Whether this is a correct interpretation of a reinsurance contract may be open to doubt, but in practice it works equitably for all concerned, and is perhaps the only practicable way of operating the contract. If a reinsurance were to apply only after the loss had exhausted the insuring company's retention, the reinsurance would be of the nature of a postponed insurance, in many cases remaining inoperative, and if that were so the reinsurers would not be entitled to be paid the full *pro rata* share of the original premium which they presently receive.

The premium paid by the insuring company to

its reinsurers is under deduction of a reinsurance commission. This is in excess of the ordinary agency commission paid by the insuring company to its agent, and, consequently, the net premium to the reinsurers is less than what the insuring company receives. This means that the loss ratio on reinsurance business is greater than on direct business, but this is counterbalanced by a lower expense ratio—particularly in the case of companies who transact nothing else than reinsurance business,—for it costs less to underwrite reinsurance business than direct business.

CHAPTER XVII.

MODIFICATIONS AND DEVELOPMENTS IN PRACTICE.

THE primary function of a contract of fire insurance is to give an indemnity for the loss caused by fire. The loss sustained is all that is covered by a fire policy. The loss must be brought about by a fire, meaning thereby the actual ignition or burning of the "property insured," and the fire must be the efficient proximate cause of the loss —*i.e.*, the direct and immediate cause. The loss is the direct loss caused by the destruction or damage by fire of the physical object described in the policy, and the loss arises from the interest which the insured possesses in the property. These are the salient features of a contract of fire insurance.[1]

But although a policy of fire insurance purports to retrieve the loss which a fire has brought about, there are clearly defined limits within which the contract operates and beyond which it cannot pass. The measure of the loss is the value which the fire has destroyed, judged by market standards—not necessarily the original value, nor what the insured

[1] See supra, chap. iii.

originally paid for it, nor yet is it necessarily the cost which would be incurred in replacing what has been destroyed. Moreover, there are certain specified things which are excluded from the scope of a fire policy, and there are also certain losses which, although brought about by an outbreak of fire, are brought about by a kind of fire, or under such circumstances, not intended to be covered by the policy.[1] It is possible, however, when the need for it arises, to widen the scope of a fire insurance contract, but when this is done it must be expressly set out in the policy.

1. *Excepted Perils.*—Losses arising from certain specified contingencies are not covered by an ordinary fire policy,[1] but these, or some of them, may now be included either by an endorsement on the policy or by a separate contract, an extra rate in some cases being charged according to circumstances.

As the onus of proving that a loss is due to an excepted peril rests with the company,[2] differences are apt to arise on questions of fact—whether, *i.e.*, the fire was actually brought about by the excepted peril, or whether it was only coincident with it; or the question may turn upon whether the conditions existing at the time of the fire were such as to constitute the event contemplated by the exception. If, *e.g.*, the company claimed exemption from liability on the grounds that the fire was due to a riot, it would require to establish that what had taken place was not merely an act of malicious injury, but that a state of riot existed

[1] See supra, chap. iv.

[2] See supra, pages 43 and 47.

at the time of the fire, and that the fire was the result of the riot.

If, however, the policy is extended to include an excepted peril no question can arise, for the company would then be liable for the loss. Thus, if the policy is endorsed to include riot and civil commotion, it would not matter whether the loss was due to a riot or was merely the act of an incendiary—in either case the company would be liable. If, however, it could be established that the loss was the result of a riot, the company, although liable to the insured in the first instance, would be subrogated to the insured's remedy against the local authority, who could not evade their statutory liability [1] merely because the loss was covered by insurance. The company in the exercise of its subrogation rights may proceed against the local authority, for recovery of the loss.

The extension of the policy to include explosion relates to concussion damage, for it is now settled practice to cover fire damage resulting from explosion under the ordinary terms of the policy.[2] Loss or damage due to concussion only is still excluded, but this can be covered also by a special provision in the policy, an extra rate being sometimes charged according to the nature of the premises insured.

2. *Household Goods Extension Clause.*—Except in the case of floating insurances a fire policy relates to one specified place only. A modification of this, however, is found in policies applying to

[1] See supra, page 69.

[2] See the standard policy and conditions.

the contents of private dwelling-houses, and such policies, by the operation of what is known as the ten per cent extension clause, now automatically cover, without any increase in rate, a proportionate value—ten per cent—of the property insured while removed temporarily to another specified place. This extended cover is not a floating insurance, but is a specific transfer for the time being of a part of the sum insured to cover a part of the property described in the policy temporarily removed elsewhere to another specified place.[1] The

[1] The clause reads :—

"*This policy extends to cover :—*

"*Household goods and personal effects as defined in the above Schedule* :—

"*A.* Belonging to such members of the insured's family or domestic servants as permanently reside upon the premises, but this protection shall not be deemed to give any right under this policy to any person other than the insured.

"*B.* Also (if and so far as such property is not otherwise insured) to the extent of *ten* per cent of the aggregate of the amounts insured thereon whilst :—

"1. Temporary removed ;

"(*a*) to any other private dwelling, or any boarding house, lodging house, hotel, inn, club, school, nursing home or hospital.

"(*b*) to any office, business or trade premises where the insured or any member of his family is working.

"2. At any bank or safe deposit (not being part of a furniture depository).

"3. Deposited for the purpose of making up, renovation, repair, cleaning, or dyeing in any laundry or trade premises.

"4. On the person.

"5. In transit.

"All in the United Kingdom.

"In the event of loss or damage at the insured's residence the sums insured for the time being shall stand reduced by the amount of the insurance so transferred."

extended cover is not subject to any average condition, for that is not necessary, seeing that the extension is in specific terms, both as to amount insured and as to locality. Thus, a policy insuring the contents of a dwelling-house for £1000 provides insurance limited to £100 in respect of any of the property insured by the policy removed for the time being to *any other* of the places enumerated in the extension clause—*e.g.*, to another dwelling-house, or to a hotel, or to a laundry; but the sum insured for the permanent address stated in the policy is reduced for the time being by the amount transferred to the temporary location. Thus, in the example given, if a fire occurred in the insured's dwelling-house while the ten per cent extension clause was in operation, say, to the full amount of £100, the insurance applicable to the dwelling-house would be reduced to £900. It should be noted that although the policy includes property belonging to the insured's family and his servants, it is the insured alone who can recover under the policy in respect of such property.

3. *Valued Policies.*—While as a rule the loss sustained is measured by the actual intrinsic value of the property at the time of the fire, an exception is made in the case of what are called *valued policies*. A valued policy is in effect an agreement between the company and the insured that the sum stated in the policy is to be taken as the value of the property insured. The value is fixed beforehand, "in order to avoid disputes as to the quantum of the assured's interest" (*Irving* v. *Manning*—

House of Lords (1847)), and in the event of a *total* loss the amount recoverable is the sum insured, that being the agreed value of the property, any question of market value being disregarded; or, to quote the terms of the Marine Insurance Act: "If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy."[1] This may appear contrary to the principle of indemnity, for when the value has been arranged beforehand in this way the company is bound to pay the sum insured in the event of a total loss, since "when the transaction is *bona fide* the valuation agreed upon is binding."—(*Barker* v. *Janson* (1868).) The insured may, therefore, recover more than his actual loss measured by market value. But a valued policy can cut both ways. If the article appreciates in value the insured would be the loser, or, as Lord Mansfield stated it (*Lewis* v. *Rucker* (1761)), the insured would "stand insurer of the surplus." On the other hand, if the article depreciated in value, the company would then be liable for more than the actual loss, and the insured would receive more than a full indemnity. If, however, the value had depreciated to such an extent as to make the sum insured and the company's liability greatly in excess of the actual loss, the company might succeed in an arbitration action, for an arbitrator would have difficulty in ignoring the principle of indemnity, and would hesitate to give an award which would result in the insured profiting by the fire. A deliberate over-valuation

[1] Sect. 68 (1), Marine Insurance Act, 1906.

—*i.e.*, where the insured knows the value to be over-stated—would render the policy void, for "an over-valuation may be evidence of fraud." "It is only when the over-valuation is so exaggerated as to show to the satisfaction of a jury that it must have been designed in order to obtain more than a just and complete indemnity that the insurance is void."—(Mr Justice Willes.) And Lord Mansfield, in the case *Lewis* v. *Rucker*, stated: "In every argument and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. If it be under-valued, the merchant himself stands insurer of the surplus. If it be much over-valued, it must be done with a bad view; either to gain . . . or with some view to a fraudulent loss."

In fire business valued policies are usually only issued for pictures and works of art. The market value of such property is not always readily ascertainable, being frequently a matter of individual opinion. If in seeking to agree the value beforehand, all that the insured wants is to ensure that in the event of loss he will recover a full indemnity, and that no dispute will then arise on the question of value, there can be no great objection to the issue of a valued policy. If the company is not satisfied with the insurer's valuation it can refuse to issue the policy, or alternatively ask for an independent valuation. The indiscriminate granting of valued policies—fortunately there is no tendency in that direction—is to be deprecated.

4. *Comprehensive Policies.*—This form of policy is a development of the combined policy for fire, burglary, and domestic servants. A combined policy has no special advantages except that it combines in one policy an insurance against fire over the contents of a private dwelling-house (including, if required, the building of the dwelling-house and the offices), along with insurances against loss by burglary, housebreaking, and larceny, and against the liability of the householder under the Workmen's Compensation Acts, the Employers' Liability Act, the Fatal Accidents Act; and, at common law, for accidents to his indoor domestic servants. The contracts for the three contingencies covered are distinct, although expressed in one policy, and the premium for each is charged and shown separately in the policy.

Like the combined policy the comprehensive policy is intended for householders, and embraces a variety of contingencies, but, unlike the combined policy, it is a single contract of insurance, an inclusive premium being charged for all the contingencies covered. The basis of the contract is a completed proposal and declaration signed by the proposer, " which proposal and declaration the insured, has agreed shall be the basis of this contract and be held as incorporated herein." [1] The premium charged for a comprehensive policy is subject to the property being insured for its full value: this is stated in the proposal, and the

[1] By these words the signed proposal is incorporated in the contract.

proposer is required to state the full value of the property to be insured. A declaration as to value is embodied in the policy thus: "The above total is declared by the insured to represent not less than the full value of the (building or contents as the case may be) insured hereby." The contract is made contingent upon the truth of the declaration, and full compliance with it is essential, not only at the time of effecting the insurance but throughout the whole currency of the policy, for the declaration is a continuing warranty, and the validity of the policy depends upon its observance as long as the policy remains in force. It is conceivable that although the declaration was true at the time the insurance commenced, the property insured may for various reasons increase in value in excess of the sum insured. In that case the sum insured would require to be increased or the contract become avoided through a breach of warranty.[1] Thus, if the insured made a true declaration at the commencement of the insurance that the sum insured represented the full value of the property insured, but at some later date, owing to additions to the property or to a rise in prices, the value exceeded the sum insured, the declaration would no longer be a true statement of fact, and unless the insured increased the sum insured to correspond with the increase in value, the contract would be rendered void. The declaration serves a purpose similar to average,[2] but it goes further than

[1] As to the effect of a breach of warranty, see pages 87 and 161.
[2] See supra, chap. xii.

average, for instead of restricting the company's liability in the event of under-insurance to a *pro rata* share of the loss, it cancels the contract altogether. Although a comprehensive policy is in more or less floating terms covering in one amount the dwelling-house and all the outbuildings in connection with the dwelling-house (and/or the contents of these), the insurance is not made subject to any average condition. This is not necessary, seeing that it is made obligatory on the insured by the terms of the policy to insure for the full value, and the absence of average from the policy makes it all the more imperative that a full insurance should be maintained.[1]

Comprehensive policies are issued in connection with private dwelling-houses only, and are in one or other of the following forms :—

(1) For building and contents of the dwelling-house, and outbuildings belonging to the dwelling-house.

(2) For contents only of the dwelling-house and outbuildings, with, if required, a fire insurance for the buildings in the ordinary terms.

[1] A question may arise as to the position of a bondholder who insures under a comprehensive policy. If he insures for his own interest only, that will be to the extent of his bond, which will be less than the full value of the property. He cannot, therefore, comply with the declaration, but as the purpose of the declaration is to prevent under-insurance, if a bondholder insuring for his own interest covers to the extent of that interest, he would appear to comply with the *intention* of the declaration.

(3) For the building only of the dwelling-house and outbuildings.

A comprehensive policy applying to the *contents* of a dwelling-house covers all loss or damage caused by any of the following contingencies :—

(1) Fire, explosion, lightning, thunderbolt, earthquake.

(2) Storm, tempest, flood; but the company's liability under this head is limited to five per cent of the full value of the contents.

(3) Riot, civil commotion, military or usurped power, strikes, labour disturbances, or malicious persons acting on behalf of or in connection with any political organisation; but all loss or damage due to these contingencies caused in *Ireland* is excluded.

(4) Aircraft risks.

(5) Bursting or overflowing of water-tanks, apparatus, or pipes.

(6) Burglary, housebreaking, larceny, or theft. Larceny or theft of cash, Treasury notes, and bank notes is not covered, nor is larceny or theft covered if the insured's dwelling-house, or any part of it, is lent, let, or sub-let. These exceptions, however, do not apply to burglary and housebreaking.[1]

The measure of liability (except in the case of storm, tempest, and flood) is the actual loss sus-

[1] It will be observed that this form of policy includes certain of the "excepted perils" excluded from the ordinary fire policy (see supra, chap. iv.).

tained, ascertained according to the ordinary rules, but in no case can the sum payable under the policy during any one year in respect of the contingencies mentioned exceed the sum insured, for the same rule in regard to recurring losses applies as in the case of an ordinary fire policy, and each claim paid reduces the sum insured until the next renewal date, when payment of the renewal premium reinstates the sum insured to its original amount.[1]

There are certain general exclusions from the comprehensive policy, viz. :—

(*a*) Loss, damage, or liability occasioned by or happening through foreign enemy.

(*b*) Loss, damage, or liability in *Ireland* occasioned by or happening through riot or civil commotion, or military or usurped power.

(*c*) Loss or damage to property while undergoing any process "necessarily involving the application of fire heat." [2]

These appear as conditions in the policy.

(*d*) Deeds, bonds, bills of exchange, promissory notes, cheques, securities for money, stamps, documents of any kind, manuscripts, medals and coins, motor vehicles and accessories, and live stock other than horses, are specifically excluded from the scope of the insurance unless otherwise specially mentioned in the policy.

A limit of value [3] (five per cent of the declared

[1] See supra, page 313. [2] See supra, page 49.
[3] See supra, page 350.

total value of the contents) is placed on any one article (except articles of furniture, pianos, and organs), unless the article is insured by a separate item apart from the other contents ; and a further provision relating to gold and silver articles, jewellery, and furs, restricts the amount recoverable in respect of these articles to one-third of the full declared value of the contents insured. It should be noted that although cash, Treasury notes, and bank notes are insured (except for larceny and theft), the total amount insured on these is limited to £25, or to five per cent of the total declared value of the contents insured, whichever is the less.

The provisions granted under the ten per cent extension clause [1] of the ordinary fire policy covering the contents of a dwelling-house apply to the comprehensive policy, with, however, certain necessary reservations in the case of larceny and theft, but the limitation of ten per cent for the extended cover relates in the case of the comprehensive policy only to fire, explosion, lightning, thunderbolt, and earthquake, the other contingencies being covered during the temporary removal for the full amount insured. The unoccupancy clause which usually appears in a burglary policy is inserted in the comprehensive policy, providing that if the dwelling-house is uninhabited longer than ninety days, whether consecutively or intermittently, in any one year, the insurance in respect of burglary, housebreaking, larceny, and theft for the dwelling-

[1] See supra, page 374.

house and the outbuildings is suspended during the period in excess of the ninety days, unless an additional premium is paid.

A comprehensive policy is intended to provide as far as possible an indemnity for all losses the insured may sustain and the liabilities he may incur as a householder, and consequently other events are covered by the policy in addition to those already mentioned, viz. :—

(1) The policy covers loss or damage to servants' property from any of the contingencies referred to while the servant is residing with the insured's family, either at his permanent residence or elsewhere in the United Kingdom where the insured or his family may be temporarily residing, provided there is no other insurance covering the servants' property. Under the ordinary household goods fire policy servants' effects are included in the sum insured along with the other contents of the dwelling-house, but in the comprehensive policy the insurance for such property appears to be an additional benefit. The description of the property insured given in the policy refers only to household goods, &c., "belonging to the insured or to members of his family permanently residing with him," and the value of the servants' property is not included in computing the total value of the contents, and not included in the sum insured.

(2) Breakage of mirrors, other than hand-mirrors, is one of the additional benefits.

(3) Damage done to the building by burglars or housebreakers, if the insured is responsible to the

proprietor of the dwelling-house for such damage, is also covered, subject to the unoccupancy clause already mentioned; and in the case of fire, if the insured is still liable for the rent of the dwelling-house, notwithstanding that it may have been rendered untenantable, this also is covered by the policy, which provides, moreover, for payment of the insured's out-of-pocket expenses for temporary accommodation until the house is made habitable again, but the aggregate payments in respect of rent and out-of-pocket expenses are restricted to ten per cent of the declared value of the contents, and are only in respect of the period necessarily required for restoring the dwelling-house to a habitable state.[1]

(4) An insurance covering the insured's legal liability to pay compensation for accidents to his servants (both indoor and outdoor, and including temporary and occasional employees, but not chauffeurs) is provided by the policy, and also a restricted insurance to cover his liability as a householder to the outside public for loss or injury sustained by them through an accident happening in or about the dwelling-house and due to fault or neglect for which the insured can be held responsible. Thus, if a messenger delivering goods at the dwelling-house meets with an accident owing to negligence on the part of the insured or any member of his household, any liability that may rest upon the insured for the injury is covered by the policy up to a stated amount. This does not

[1] See supra, page 331.

refer to the liability of a *property owner* for accidents to the public caused through defects in the property—that liability is provided for under a comprehensive policy in the proprietor's name covering the building; nor does it refer to any liability resting upon the insured for accidents to any workman employed by him to do work in or about the house. Such a person would come within the category of a temporary or occasional employee, and be covered under the section of the policy dealing with accidents to servants; nor does it refer to workmen employed by a tradesman with whom the insured has contracted to execute repairs or do other work about the house.

(5) The policy provides also for payment of a stated sum of money in the event of the insured meeting with fatal injuries caused by burglars or housebreakers, or if he loses his life as the result of a fire. This applies to the insured only, not to the other members of his household.

These events are additional benefits granted by the policy, and any claim paid under the policy in respect of any of the contingencies mentioned on page 382 does not affect the insured's right to the full advantage of these additional benefits. Thus, if a total loss by fire was paid, thus exhausting the sum insured, the insured would nevertheless be entitled to recover, *in respect of the same event*, under the sections of the policy relating to servants' goods and loss of rent; and similarly, any claim paid under the sections of the policy providing for

accidents to servants and liability to the public would not diminish the amount recoverable in the event of a total loss by fire, or by any other of the perils covered by the policy.[1]

A comprehensive policy is issued also for the *building* of the dwelling-house and outbuildings, but naturally the scope of such a policy is narrower than a comprehensive policy for the contents, for several of the events provided for in a contents policy are not applicable to a building, while others, although acceptable where the contents are concerned, are not so for building. Earthquake shock, *e.g.*, would in all likelihood cause more damage to the building than to the furniture, and similarly in the case of damage from storm or from burst water-pipes. Consequently, the following contingencies covered under a contents policy are excluded where the building is insured, viz. :—

(1) Earthquake.
(2) Storm, tempest, and flood.
(3) Bursting or overflowing of water-tanks, apparatus, or pipes.
(4) Larceny and theft.

With these exceptions, the contingencies enumerated on page 382 are covered under a comprehensive policy insuring the building of the dwelling-house and offices.

As additional benefits, loss of rent is covered up to ten per cent of the declared value of the prop-

[1] A total loss from any of the perils insured against would exhaust the sum insured by the policy and terminate the contract entirely.

erty,[1] and also the insured's liability as a property owner for loss and injury to third parties caused through defects in the property, the amount recoverable being limited to a stated sum. By a condition of the policy—the same as what appears in the contents policy,—losses due to foreign enemy, and, in Ireland, to riot and civil commotion or military and usurped power, are excluded.

The other conditions of a comprehensive policy for both building and contents follow lines similar to those of the ordinary fire policy, and provide for contribution among co-insurers, the duties to be performed by the insured when a claim arises, reinstatement, right of entry, subrogation, fraudulent claims, arbitration. There is no condition importing average from a subsisting average policy over the same property. This, of course, is not necessary, seeing that a comprehensive policy requires a full insurance, and that being so, even if average were imported into the policy, it would remain inoperative; nor is there a condition relating to misdescription and non-disclosure. Such a condition is also unnecessary, since the signed proposal is agreed to be taken as the basis of the contract, and if anything in the proposal is wrong or misleading the contract is avoided. For the

[1] If the insured is owner and occupier of the dwelling-house, and both building and contents are insured under comprehensive terms in the same policy, the amount payable under the rent section of the policy is up to ten per cent of the declared value of the building for loss of rent, and up to ten per cent of the declared value of the contents for out-of-pocket expenses for temporary accommodation.

same reason—viz., that the proposal signed by the insured is the basis of the contract,—there is no condition in the policy against alienation of interest. The condition in the ordinary fire policy relating to alterations in risk is also absent, for obviously it is not conceivable that any alteration could be made on a private dwelling-house that would materially affect the fire risk.

5. *Reinstatement or Replacement Value Policies.* —These policies are supplementary to the ordinary fire policy, and are issued to give protection against a loss which is not recoverable under the fire policy. A fire policy is liable only for the actual, or market, value of the property insured at the date of the fire, but that value for various reasons may be less than the cost of reinstating the property, and, consequently, any expenditure which the insured incurs in replacing or restoring the property in excess of what he has recovered under the fire policy is a loss that falls upon himself. To cover that loss is the purpose of a reinstatement policy. The primary function of such a policy, therefore, is to cover the difference between the amount recoverable under a fire policy—*i.e.*, the actual value at the time of the fire—and the cost incurred by the insured in reinstating, or *replacing*, the property damaged or destroyed.

Reinstatement policies are issued chiefly for machinery, for when machinery is destroyed the insured in almost every case suffers a loss, seeing that it is only rarely that the amount paid under the fire policy will be sufficient to meet the cost

of reinstatement.[1] A reinstatement policy, however, is sometimes issued for building also; but as a building loss, except in cases of excessive dilapidation, is usually adjusted on the basis of cost of reconstruction,[2] a reinstatement policy for building should not be necessary if the building is fully covered under the ordinary fire policy. If, however, a reinstatement policy is issued for buildings, it is more of the nature of an excess insurance[3] to be available in case the amount recovered under the fire policy is not sufficient owing to under-insurance to cover the whole cost of reconstruction.[4]

A reinstatement insurance may be expressed in a separate policy, the sum insured being the difference between the sum insured by the ordinary fire

[1] See supra, page 322.

[2] See supra, page 317.

[3] An excess insurance is not a concurrent contract with the ordinary fire policy. Athough it covers the same loss it does not function until the fire policy has met its full liability, when the excess insurance comes in to take up any balance of loss uncovered by the fire policy.

[4] A reinstatement policy issued to cover the increased cost of reinstatement would seem, according to the terms in which the contract is expressed, to be restricted to the difference between the cost of reinstatement *and the value of the property at the time of the fire.* The undertaking is to pay the cost of reinstatement after deducting the amount recovered under the fire policy, or after deducting the value of the property at the date of the fire if the sum insured by the fire policy happens to be less than the value of the property. If that is a correct interpretation of the contract a reinstatement policy would seem to be valueless so far as a building is concerned, for assuming the building to be in good repair, its value at the time of the fire for the purpose of ascertaining the loss to the fire policy is its reinstatement value. (See supra, page 317.)

policy—as representing the actual value of the property—and the estimated cost of reinstatement; or the fire policy may be extended by endorsement to include reinstatement value, in which case the sum insured is the full estimated cost of reinstatement. But whichever course is adopted, it is made clear in the policy that the company is liable only to pay for "rebuilding or replacing the property destroyed or damaged by property of the same kind or type, but not superior to or more extensive than such property when new." The insured, therefore, cannot recover under the policy, if it is machinery that is insured, the cost of new machinery of an improved type or pattern, or a greater expenditure than is necessary to restore the machinery to its original design; nor if building is insured can he recover the cost of any improvements on the original plans, for in either case that would be to give him more than an indemnity.

The contract, moreover—whether it applies to buildings or machinery, or both,—is based upon the understanding that it is the insured's intention to reinstate. That is a vital condition of the contract, for nothing can be recovered under the policy until the insured has actually incurred the costs of reinstatement, and then only the actual amount expended, within the limit of the sum insured. If the insured does not reinstate, and does not intend to reinstate, the policy remains inoperative, or if reinstatement value is insured by an extension of the ordinary fire policy, the

company is liable only for the actual value of the property at the time of the fire.

When a separate policy is issued to cover the increased cost of reinstatement, it contains a condition requiring the insured to keep the property insured against loss or damage by fire under the ordinary policy, and no payment under the reinstatement policy can be made unless and until the insurers upon the fire policy "shall have paid for or admitted liability in respect of the loss of or damage to the property by fire." This condition is apparently considered necessary, seeing that the reinstatement policy is a supplementary contract to the fire policy, operating to indemnify the insured for a loss he is unable to recover under the fire policy.[1] A reinstatement policy issued to cover

[1] If the reinstatement policy is intended to apply to a loss which lies outside the scope of the fire policy, and which, therefore, under no circumstances could be recovered under the fire policy, it is not quite clear why the condition should be necessary. If the reinstatement policy is liable for the difference between the actual value and the cost of reinstatement, it should make no difference to a reinstatement contract whether the ordinary fire loss is covered or not. It may be considered expedient, however, to make some stipulation such as this requiring the property to be insured for ordinary fire loss, in order to avoid difficulties in adjusting a loss, for an insured who is uninsured for the fire loss migh in the hope of recovering a part of his uninsured loss from the reinstatement policy purposely value the property under its actual value. The application of average, however, in a case of this sort would defeat the insured's purpose. A reinstatement policy relates to the same perils as those provided for under a fire policy, and consequently, if the ordinary fire loss is not covered by the fire policy, the reinstatement loss would not be covered by the reinstatement policy.

the increased cost of reinstatement is excluded from contributing to the fire loss ratably along with the ordinary fire policy,[1] although it would contribute ratably along with other subsisting reinstatement policies towards the common loss covered by these policies; and another condition of the policy provides that if the increased cost of reinstatement exceeds the sum insured, the company will only pay such proportion of any loss as the sum insured bears to the increased cost of reinstatement, thus:—

Sum insured on Increased Cost of Reinstatement—£2000.

	Total Values.	Losses.
Cost of reinstatement	£8000	£1500
Actual Value (covered by the ordinary fire policy)	5000	1000
Increased cost of reinstatement (covered by reinstatement policy)	£3000	£500

Liability $\frac{2000}{3000}$ of £500 = £333.

If for any reason, such as the operation of average, the sum recoverable under the fire policy happens to be less than the value destroyed by the fire, the loss under the reinstatement policy is adjusted on the basis of the difference between total cost of reconstruction and the actual value of the property, the sum recovered under the fire policy being disregarded,[2] thus:—

[1] See supra, page 142.

[2] The undertaking is to pay the difference between the cost of reinstatement and the amount recovered under the ordinary fire policy covering the property, *or the value of the property at the date of the fire, whichever is the greater.*

Insurances.			Total Values.	Losses.
Fire Policy (subject to average . . .	£4000	Cost of reinstatement .	£6000	£1500
Reinstatement policy	1000	Actual value (covered by fire policy) .	5000	1000
		Increased cost of reinstatement (covered by reinstatement policy) . .	£1000	£500
	£5000			

The liability of the fire policy under average is—

$\frac{4000}{5000}$ of £1000 . . . . = £800

The liability of the reinstatement policy is—

£1500 less actual value, £1000 . . = £500

£1300

The insured recovers under the reinstatement policy only the difference between the value at the time of the fire and the cost of reinstatement, because a reinstatement policy, unlike an excess policy, cannot be utilised to take up any balance of the loss uncovered by the fire policy.

When the ordinary fire policy is extended to include reinstatement value, the loss is adjusted on the basis of the cost of reinstatement instead of the actual value of the property at the time of the fire; but as average is applied, the liability of the company under the policy is the proportion which the sum insured bears to the full reinstatement value of the property, so that when the loss is partial, unless the reinstatement value is fully covered, the insured will recover only a part of

the loss. It is made a condition of the insurance also that all other insurances over the property extend to cover reinstatement value,[1] and that in the event of loss the policy will contribute rat-ably with these other policies in the proportion which the sum insured by the policy bears to the total insurances on the property.

The principles that govern a reinstatement policy prevent the insured from recovering more than a full indemnity. It is only what has actually been expended on reinstating the property that is paid, and then only provided the cost of reinstatement has been fully insured. But notwithstanding this, it is necessary to exercise more discretion in granting a policy of this description than is required in the case of an ordinary fire policy. A reinstatement policy relates not to the direct loss arising from the destruction of existing values, but to a consequential or contingent loss, the incidence of which is not known until after the fire, and is, therefore, more or less speculative. A fire policy gives an indemnity for a loss which the insured has actually sustained; a reinstatement policy is intended to relieve the insured of an expenditure he would not have incurred but for the fire; and generally it is a contract at variance with the primary principles of fire insurance, since it is an

[1] This is necessary, else difficulties and complications would arise in apportioning a loss amongst the various policies. If, *e.g.*, one policy covered the full reinstatement value, while another covered the ordinary fire loss only, it would be a difficult matter to apportion the share of the fire loss to the reinstatement policy.

undertaking to give "*new for old.*" In some instances the insured under a reinstatement policy may receive a payment where no real loss has been incurred. This will happen in the case of machinery which is nearing the end of its effectual life. A fire policy would pay for such machinery probably no more than its break-up value—that being its value at the time of the fire,—but when reinstatement value is covered the company is liable for the cost of replacement, regardless of the condition of the machinery at the time of the fire, so long as it is replaced by machinery of the same type, and the sum insured is adequate to cover the increased cost of reinstatement. There is no question of indemnity in a case of this sort. Sooner or later the insured would have been forced at his own expense to replace the worn-out plant with new machinery, but the fire intervening has relieved him of this, and the reinstatement policy is meeting an expenditure which the insured would have had to bear himself had the fire not occurred.[1]

6. *Adjustable Stock Policies.*—These policies are issued to meet the requirements of manufacturers and traders whose stock is liable to fluctuate

[1] A further point is that in the insured's books the machinery stands at a depreciated value (see supra, page 323). Where, however, owing to inflated prices—as happened during the war period—the cost of new machinery is greatly in excess of the price originally paid, and the amount written off at the ordinary rate of depreciation is, in consequence, inadequate as a reserve for replacement purposes, the insured would, in the event of a fire, suffer an undoubted loss, which he could only recover under a reinstatement policy.

throughout the course of the year. A merchant, *e.g.*, may effect an insurance on his stock for its value as existing at the time he took out the policy, but for various reasons changes in the value may take place at intervals during the currency of the policy necessitating some alteration in the sum insured. An adjustable policy provides for this by affording the insured facilities for adjusting the sum insured periodically as the values fluctuate, without requiring to take out new policies. This is done by an endorsement on the policy in the following form :—

Adjustment of Sum Insured.

Policy No.................. Expiry... . ...
Name........................

Notwithstanding anything to the contrary within stated, it is hereby declared and agreed that the sum insured under this policy is the amount as shown by the last entry on the Schedule below as from the date of such entry.

Date.	No. of Endt.	Sum Insured.	Annual Premium.	Return Premium.	Additional Premium.	Signed on behalf of the Company.
		£	£ s. d.	£ s. d	£ s. d.	

It will be observed that the alteration in the sum insured takes effect from the date the alteration is made, and represents the maximum sum insured by the policy from that date until the next adjustment (if any) is made. If the sum insured

is reduced by the adjustment, a return of premium is made to the insured on the difference between the old and the new amounts for the period the policy has still to run; and conversely, if the sum insured is increased, an additional premium is charged, both being calculated on a *pro rata* basis, thus :—

Policy issued for £50,000.
Reduced to £40,000 at end of 3 months.
  Return $=\frac{9}{12}$ths of the annual premium for £10,000 (the amount cancelled).
Increased from £40,000 to £45,000 at end of 6 months.
  Additional premium $=\frac{6}{12}$ths of the annual premium for £5000.
Reduced from £45,000 to £30,000 at end of 9 months.
  Return $=\frac{3}{12}$ths of the annual premium for £15,000 (the amount cancelled).

The result is the same as if at each successive adjustment a new policy had been issued for the new amount (as was formerly the practice), and made to expire at the same date as the original policy, a return of premium being allowed for the unexpired period of the cancelled policy.

An adjustable policy should be distinguished from a declaration policy, under which the insured declares periodically during the currency of the policy the values of the stock, the declared value being taken to be the amount insured for the subsequent period until the next declaration is made. At the end of the term of the insurance these declared values are averaged and the premium adjusted on the average for the term. If the

premium thus brought out is less than what was originally paid, a return is made to the insured of the difference, and *vice versa* if more, the insured paying the extra.

7. *Contract Price Policies.*—Reference has already been made to these policies.[1] If a manufacturer has contracted to supply certain goods at a price agreed upon beforehand, and a fire occurring and destroying the goods while still in his hands results in the contract being cancelled, the loss under a policy containing the contract price clause is adjusted on the basis of the price at which he had contracted to supply the goods. If, however, the contract is not terminated by the fire, but continues as a binding contract on both buyer and seller, the basis of adjustment is market value.

When a price is fixed by contract, the contract creates a value independent of market value, and apart from any special provision in the policy, if the insured is to receive no more than an indemnity for his loss, the only basis of adjustment is the contract price. This is obvious where the contract price happens to be below market value, for to pay market value for goods which the insured has invoiced at something less would be to put him in a better position than he occupied before the fire. What the clause is intended to provide for, however, is where the contract price exceeds the market price. If the policy is in the usual terms covering stock-in-trade, "in no case exceeding the market value of the same immediately

[1] See supra, page 330.

anterior to the fire," the insured would be precluded from recovering more than the market value, notwithstanding that he had invoiced the goods at a price in excess of it. The contract has created a value which would be lost to the insured if the goods forming the subject of the contract were destroyed. The insured is deriving an immediate advantage and benefit from the goods, and as the fire would deprive him of that he is entitled to be indemnified accordingly, otherwise if he were to be indemnified on the basis of market value only, his whole loss would not be covered. It might be argued, however, that the contract did not enhance the intrinsic value of the goods, but merely gave the insured a larger profit than he would otherwise have been able to earn. The value created by the contract was a fictitious value which existed only so long as the contract existed, and if the insured receives the market value which, in the absence of any contract, would have been the actual value of the goods, he is being fully indemnified for his loss. It cannot be denied, however, that a fire would deprive the insured of an immediate advantage he is deriving from the goods, and to that extent he would suffer a direct loss that would not be met by settling his claim on the basis of market value only. The value which the fire has destroyed is the value of the goods to the insured arising out of the contract, and as that value has been lost and the contract cancelled as the result of the fire, the insured would appear to be entitled to be indemnified on the basis of con-

tract price. If, however, notwithstanding the fire, the insured is still bound to supply the goods he had contracted to supply, his loss would be determined by the price he would have to pay in the open market for other goods to replace those destroyed. There would be no other alternative, for if the insured were paid on the basis of contract price and purchased goods in the open market at less than the contract price, he would be deriving a profit out of the fire. On whichever basis the loss is adjusted—on contract price if the contract is cancelled, or market value if the contract is not cancelled,—the insured is recovering no more than an indemnity, for in the one case he is being paid under the policy the price he would have received from the buyer—the price, *i.e.*, at which he had invoiced the goods,—and in the other he is recovering the price he has to pay in the open market for other goods of the same quality and description. The policy, therefore, is not giving him an advantage he was not enjoying at the time of the fire, and consequently, he is not recovering more than a full indemnity for his loss.

APPENDIX.

SPECIMEN OF THE POLICY CONDITIONS USED BY MANY OF THE COMPANIES.

1. This Policy shall be voidable in the event of misrepresentation, misdescription, or non-disclosure in any material particular. Misdescription.

2. This Policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance— Alteration.

(1) by removal;

or (2) whereby the risk of destruction or damage is increased;

or (3) whereby the Insured's interest ceases except by will or operation of law,

unless such alteration be admitted by memorandum signed by or on behalf of the (Company).

3. This Policy does not cover— Exclusions.

(*a*) Destruction or damage by explosion (whether the explosion be occasioned by fire or otherwise). } Except as stated on the face of this Policy.

(*b*) Goods held in trust or on commission, money, securities, stamps, documents, manuscripts, business books, patterns, models, moulds, plans, designs, explosives. } Unless specially mentioned as insured by this Policy.

Claims. 4. On the happening of any destruction or damage, the Insured shall forthwith give notice thereof in writing to the (Company), and shall, within 30 days after such destruction or damage, or such further time as the (Company) may in writing allow, at his own expense deliver to the (Company) a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively having regard to their value at the time of the destruction or damage together with details of any other Insurances on any property hereby insured. The Insured shall also give to the (Company) all such proofs and information with respect to the claim as may reasonably be required, together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with.

Fraud. 5. If the claim be in any respect fraudulent, or if any fraudulent means or devices be used by the Insured or any one acting on his behalf to obtain any benefit under this Policy, or if any destruction or damage be occasioned by the wilful act or with the connivance of the Insured, all benefit under this Policy shall be forfeited.

Reinstatement. 6. If the (Company) elect or become bound to reinstate or replace any property, the Insured shall at his own expense produce and give to the (Company) all such plans, documents, books, and information as the (Company) may reasonably require. The (Company) shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonably sufficient manner, and shall not in any case be bound to

expend in respect of any one of the items insured more than the sum insured thereon.

(Company's) rights after a fire.

7. On the happening of any destruction or damage in respect of which a claim is or may be made under this Policy, the (Company) and every person authorised by the (Company) may, without thereby incurring any liability and without diminishing the right of the (Company) to rely upon any conditions of this Policy, enter, take, or keep possession of the building or premises where the destruction or damage has happened, and may take possession of or require to be delivered to them any of the property hereby insured, and may keep possession of and deal with such property for all reasonable purposes and in any reasonable manner. This Condition shall be evidence of the leave and licence of the Insured to the (Company) so to do. If the Insured or any one acting on his behalf shall not comply with the requirements of the (Company), or shall hinder or obstruct the (Company) in doing any of the above-mentioned acts, then all benefit under this Policy shall be forfeited. The Insured shall not in any case be entitled to abandon any property to the (Company), whether taken possession of by the (Company) or not.

Contribution and average.

8. If at the time of any destruction of or damage to any property hereby insured there be any other Insurance effected by or on behalf of the Insured covering any of the property destroyed or damaged, the liability of the (Company) hereunder shall be limited to its ratable proportion of such destruction or damage.

If any such other Insurance shall be subject to any Condition of Average, this Policy, if not already subject to any Condition of Average, shall be subject to Average in like manner.

If any other Insurance effected by or on behalf of the Insured is expressed to cover any of the

property hereby insured, but is subject to any provision whereby it is excluded from ranking concurrently with this Policy either in whole or in part, or from contributing ratably to the destruction or damage, the liability of the (Company) hereunder shall be limited to such proportion of the destruction or damage as the sum hereby insured bears to the value of the property.

Subrogation. 9. Any claimant under this Policy shall at the request and at the expense of the (Company) do and concur in doing and permitting to be done all such acts and things as may be necessary or reasonably required by the (Company) for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the (Company) shall be or would become entitled or subrogated upon its paying for or making good any destruction or damage under this Policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the (Company).

Warranties 10. Every Warranty to which the Property insured or any item thereof is, or may be, made subject, shall from the time the Warranty attaches apply and continue to be in force during the whole currency of this policy, and non-compliance with any such Warranty, whether it increases the risk or not, shall be a bar to any claim in respect of such property or item; provided that whenever this Policy is renewed a claim in respect of destruction or damage occurring during the renewal period shall not be barred by reason of a Warranty not having being complied with at any time before the commencement of such period.

Arbitration. 11. All differences arising out of this Policy shall be referred to the decision of an Arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single Arbitrator,

to the decision of two Arbitrators, one to be appointed in writing by each of the Parties within one calendar month after having been required in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings, and the making of an Award shall be a condition precedent to any right of action against the (Company). After the expiration of one year after any destruction or damage the (Company) shall not be liable in respect of any claim therefor, unless such claim shall in the meantime have been referred to Arbitration.

MORTGAGEES' CLAUSE.

It is hereby declared and agreed that in the event of anything whereby the risk is increased having been or being done to, upon, or in any building hereby insured, without knowledge of the Mortgagees, this Company will not seek to avoid its liability so far as the interest of the Mortgagees may be concerned; subject, however, to the liability of the Mortgagees to give notice to this Company of such increase of risk so soon as the same shall come to the knowledge of the Mortgagees, and to pay to this Company the necessary additional premium from the time when such increase of the risk first took place; and this Company further agrees with the Mortgagees that in the event of this Company desiring not to continue the insurance under this policy after such increase of risk has come to its knowledge as aforesaid, it will not exercise its right in this respect except upon 28 days' previous notice to the said Mortgagees.

FORM OF STATUTORY DECLARATION.

Verification by Statutory Declaration.

(To be declared before any justice of the peace, notary public, or other officer by law authorised to administer an oath).

I,.., the above-named claimant, do solemnly and sincerely declare that the above-stated particulars are true to the best of my knowledge, information, and belief, and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(Signed)........ ....

FORMS OF DISCHARGE TAKING SUBROGATION.

(1) Received from the . . . Insurance Company the sum of £ . . . in full discharge of my claim for loss and damage in consequence of fire on or about the . . . 19 to property insured under Policy No. . . ., in consideration whereof each item of said Policy is declared to be reduced by the amount paid under the same until the date of the next renewal, and I hereby assign to the said Insurance Company all claims which may be competent to me for recovery of said loss and damage or any part thereof from any person whatsoever, including the right to bring an action in my name against the said person or persons, it being understood that the said Insurance Company will indemnify me against all expense in this regard.

(2) Received from the . . . Insurance Company the sum of £ . . . in full discharge of my claim for loss and damage in consequence of fire on or about the . . . 19 to property insured under Policy No. . . ., in consideration whereof each item of said Policy is declared to be reduced by the amount paid under the same until the date of the next renewal; and I hereby assign to the said Insurance Company all claims which may be competent to me for the recovery of the said loss and damage, including the right to bring an action in my name against any person or persons whatsoever, whether individually or in association with one another, it being hereby understood that the said Insurance Company will indemnify me against all expense in this regard. And I do further undertake that if any person, firm, Company, Government, or other Authority shall make any payment to me in respect of the loss or damage sustained by me in consequence of the said fire, the amount recovered shall be applied firstly in or towards giving me a complete indemnity against the loss or damage caused to the property insured by the said fire if, in fact, I have not already been completely indemnified in respect thereof, and secondly to the repayment to the Company of the amount hereby acknowledged.

FIRES PREVENTION (METROPOLIS) ACT, 1774.

14 Geo. III., c. 78 (Sects. 83 and 86).

83. And, in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the

lives and fortunes of many families may be lost or endangered: be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorised and required, upon the request of any person or persons interested in, or entitled unto, any house or houses, or other buildings, which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings so burnt down, demolished or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.

86. And no action, suit, or process whatever, shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered

thereby, any law, usage, or custom to the contrary notwithstanding: And in such case, if any action be brought, the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial thereupon to be had; and in case the plaintiff become nonsuited, or discontinue his action or suit, or if a verdict pass against him, the defendant shall recover treble costs, provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

TOWN POLICE CLAUSES ACT,' 1847.

10 & 11 Vict., c. 89 (Sects. 30, 31, 32, and 33).

And with respect to fires, be it enacted as follows:—

30. Every person who wilfully sets or causes to be set on fire any chimney within the limits of the special Act shall be liable to a penalty not exceeding five pounds; Provided always, that nothing herein contained shall exempt the person so setting or causing to be set on fire any chimney from liability to be indicted for felony.

31. If any chimney accidentally catch or be on fire within the said limits, the person occupying or using the premises in which such chimney is situated shall be liable to a penalty not exceeding ten shillings: Provided always, that such forfeiture shall not be incurred if such person prove to the satisfaction of the justice before whom the case is heard that such fire was in nowise owing to omission, neglect, or carelessness of himself or servant.

32. The commissioners may purchase or provide such engines for extinguishing fire, and such water-

buckets, pipes, and other appurtenances for such engines, and such fire-escapes and other implements for safety or use in case of fire, and may purchase, keep, or hire such horses for drawing such engines, as they think fit, and may build, provide, or hire places for keeping such engines with their appurtenances, and may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper, and give such firemen and other persons such salaries and such rewards for their exertions in cases of fire, as they think fit.

33. The commissioners may send such engines, with their appurtenances, and the said firemen, beyond the limits of the special Act, for extinguishing fire in the neighbourhood of the said limits; and the owner of the lands or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the commissioners a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen; and in case of any difference between the commissioners and the owner of the said lands or buildings, the amount of the said expenses and charge, as well as the propriety of sending the said engines and firemen as aforesaid for extinguishing such fire (if the propriety thereof be disputed), shall be determined by two justices, whose decision shall be final; and the amount of the said expenses and charge shall be recovered by the commissioners as damages.

BURGH POLICE (SCOTLAND) ACT, 1892.

55 & 56 VICT., C. 55 (Sects. 289-299).

FIRE AND FIRE ESTABLISHMENT.

289. Every person who wilfully sets or causes to be set on fire any chimney shall be liable to a penalty not exceeding five pounds; Provided always, that nothing herein contained shall exempt the person so setting or causing to be set on fire any chimney from liability to be indicted or prosecuted therefor before any criminal court.

290. If any chimney catch or be on fire, the person occupying or using the premises in which such chimney is situated shall be liable to a penalty not exceeding ten shillings, unless he shall prove to the satisfaction of the magistrates that such fire was in nowise owing to omission, neglect, or carelessness of himself or servant, and such person shall pay the expenses incurred in extinguishing the fire, as the same shall be fixed by the magistrate.

291. The Commissioners may purchase or provide such engines for extinguishing fire, and such water-buckets, pipes, and other appurtenances for such engines, and such fire-escapes and other implements for safety or use in case of fire, and may purchase, keep, or hire such horses for drawing such engines, as they think fit, and may build, provide, or hire places for keeping such engines with their appurtenances, and may employ a proper number of persons to act as firemen, and to be named the fire brigade, and may appoint a firemaster, who may be the chief constable, and who shall be the superintendent of the fire brigade, and may provide suitable dwellings for such firemaster

and firemen, and make such rules for their regulation as they think proper, and give such firemaster and firemen such salaries and such rewards for their exertions in cases of fire as they think fit.

292. The Commissioners may cause to be put up, at or upon the railings or in or upon the walls of buildings or elsewhere in the streets, public or private fire-alarms, battery-boxes and index plates, or make markings showing the position of the fireplugs in such streets or places, and may put down fireplugs in any footpath or street whether public or private, and may attach telephone or telegraph wires necessary for the working of the fire establishment to any land or heritage without being liable to any claim for compensation for so doing; and any person who shall cause any obstruction to the putting up of such plates or markings or who shall pull down, injure, deface, or destroy the same, or shall wantonly ring any such fire-alarm, shall be liable to a penalty not exceeding five pounds for each offence; and any person feeling himself aggrieved as to the mode in which the Commissioners may carry out any of the powers herein contained may appeal to the sheriff, whose decision shall be final: Provided that no such telephone or telegraph wires shall be used, nor shall the powers herein contained be in any way exercised in contravention of the exclusive privileges conferred on Her Majesty's Postmaster-General by the Telegraph Act, 1869.

293. The fire brigade may enter, and, if necessary, break into any building in the burgh being on fire, or any buildings or lands adjoining or near thereto, without the consent of any owner or occupier thereof respectively, and may do all such acts and things as they may deem necessary for extinguishing fire in any such building, or for protecting the same or rescuing any person or

property therein from fire; and any damage done in the exercise of such powers shall be deemed to be damage done by fire.

294. The senior officer of the fire brigade present at any fire shall have the sole charge and control of all operations for the extinction of such fire, whether by the Commissioners' engines or appliances, or any other or others, including the fixing of the positions of fire-engines and apparatus, the attaching of hose to any water-pipes or water supply, the shutting off the water from other parts of the building on fire or of adjoining buildings against which the water is to be directed.

295. The senior officer of the fire brigade or of police present on the occasion of any fire shall be entitled, where he considers the same necessary, to enable the fire brigade better to discharge their duties, or for the protection of the hose or other appurtenances, or for the safety of the public, to shut up temporarily by means of a guard of constables or other persons, or a rope, chain, tressels, or barricade, any street, court, or passage in or near the place where such fire exists; and every person wilfully using such street, court, or passage while it is temporarily shut up, without the consent of the fire brigade or police, shall be liable to a penalty not exceeding five pounds.

296. The burgh prosecutor or depute burgh prosecutor shall examine and take the evidence of all or any parties reasonably supposed by him to be able to give information as to how the fire originated; and any parties refusing to be examined shall be liable to a penalty not exceeding ten pounds, but parties suspected of wilful fire-raising shall not be bound to give evidence or be examined by the burgh prosecutor or depute burgh prosectuor relative to such fire.

297. The chief constable or chief officer of police

shall, if he consider it necessary for the ends of justice, be entitled to retain possession of the premises in which the fire has occurred until twenty-four hours after the circumstances of the fire have been reported to the burgh prosecutor.

298. The Commissioners or the firemaster may use such engines, with their appurtenances, and the said firemen, beyond the boundaries of the burgh, for extinguishing fire in the neighbourhood of the burgh; and the owner or, if the Commissioners think fit, the occupier of the premises where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the Commissioners a reasonable charge for the use of such engines, with their appurtenances, and for the attendance of such firemen; and in case of any difference between the Commissioners and the owner or occupier of such premises, the amount of the said expenses and charge shall be determined by the sheriff, whose decision shall be final; and the amount of the said expenses and charge shall be recoverable by the Commissioners as any debt may be recovered.

299. The firemaster shall make up and deliver to the Commissioners a statement of the whole expenses attending each fire, which shall include the wages payable to the firemen and other persons employed at it, the rewards or premiums which he recommends to be given to them, the outlay incurred in taking them and the engines to the spot where such fire occurred, and in obtaining a supply of water, and other the like expense, and such statement, in so far as approved of or as altered by the Commissioners, shall be *prima facie* evidence of the amount of expenses attending the said fire.

LOCAL GOVERNMENT (SCOTLAND) ACT, 1908.

8 EDW. VII., c. 62 (Sect. 8).

PROVISIONS RELATING TO FIRES.

8.—(1) The county council may purchase or provide, for use in the whole county or in any one or more districts or special districts thereof, such engines (whether mechanically propelled or other) for extinguishing fire, and such water-buckets, pipes, and other appurtenances for such engines, and such fire-escapes and other implements, vehicles (whether mechanically propelled or other), or articles, for safety or use in case of fire, and may purchase, keep, or hire such horses for drawing such engines, and may arrange for such telegraphic or telephonic connections, as they think fit, and may build, provide, or hire places for keeping such engines and horses with their appurtenances, and may insert fireplugs, and may employ a proper number of persons to act as firemen, and may appoint a firemaster or firemasters (who shall be superintendent or superintendents of the fire brigade or fire brigades), any or all of which persons may, with the consent of the police committee, be members of the police force, and may make such rules for their regulation as they think proper, and pay to such firemaster or firemasters and firemen such salaries and such rewards for their exertions in cases of fire as they think fit.

(2) Two or more county councils may combine for all or any of the purposes of the immediately preceding subsection, and without prejudice to the provisions of section two hundred and ninety-eight

of the Burgh Police (Scotland) Act, 1892, a county council may enter into an agreement with the town council of any burgh or police burgh or with any other county council for making the fire-engines belonging to such county or town council, with their appurtenances, regularly available for use within the county or any district or special district thereof, or burgh or police burgh, on such terms and subject to such conditions as shall be specified in the agreement.

(3) Any expenditure incurred in carrying out the purposes of this section or any of them shall be apportioned to and paid out of the public health general assessment leviable within the county or (where the county is divided into districts) within any district thereof or within any special district thereof in which such fire brigades are made available, or in the case of a special district out of any special district assessment leviable therein, and that in such proportions as the county council may direct. The county council may borrow for such of the purposes of this section as the Secretary for Scotland may by order prescribe on the security of the assessment or assessments aforesaid.

(4) The said engines and their appurtenances may be used, and the firemen may be employed, beyond the boundaries of the county or a district or special district thereof, for extinguishing fires in the neighbourhood of the said county or district; and the owner or, if the county council or combination think fit, the occupier of the premises in which such fire shall have occurred shall in such case (unless the premises are situated in a county or district within which the engines and their appurtenances are regularly available for use under an agreement as by this section authorised) defray the expenses attending such fire, and shall also pay to the county council a reasonable charge for

the use of such engines and their appurtenances and for the attendance of the firemen.

(5) In case of any difference between the county council and any owner or occupier, the amount payable as aforesaid shall be determined summarily by the sheriff, whose decision shall be final.

(6) The firemaster shall (where necessary for the purposes of this section) make up and deliver to the county council a statement of the expenses attending a fire, which shall include the wages payable to the firemen and other persons employed at it, the rewards, if any, which he recommends to be given to them, and the outlay incurred in taking them and the engines to the place where such fire occurred, and in obtaining a supply of water and other like expenses; and such statement, in so far as approved of or modified by the county council, shall be *prima facie* evidence of the amount of expenses attending such fire.

(7) For the purposes of this section, a county council or combination shall have the same powers and duties as those assigned to town commissioners within the meaning of the Waterworks Clauses Act, 1847.

(8) The county council may, through their employees, for the purpose of extinguishing or preventing the spread of fire, take and use any convenient or suitable supply of water, but shall be liable to pay compensation to any person who shall suffer loss thereby, and to make payment to the local authority or other person entitled thereto for the water used.

(9) A telegraphic or telephonic connection under this section shall not be used in contravention of the exclusive privilege conferred upon the Postmaster-General by the Telegraph Act, 1869.

CARRIERS ACT, 1830.

11 Geo. IV. & 1 William IV., c. 68.

Whereas . . . Be it therefore enacted . . . That from and after the passing of this Act no Mail Contractor, Stage Coach Proprietor, or other common Carrier by Land for Hire shall be liable for the Loss of or Injury to any Article or Articles or Property of the Descriptions following; (that is to say,) Gold or Silver Coin of this Realm or of any Foreign State, or any Gold or Silver in a manufactured or unmanufactured State, or any Precious Stones, Jewellery, Watches, Clocks, or Time-pieces of any Description, Trinkets, Bills, Notes of the Governor and Company of the Banks of *England*, *Scotland*, and *Ireland* respectively, or of any other Bank in *Great Britain* or *Ireland*, Orders, Notes, or Securities for Payment of Money, *English* or Foreign, Stamps, Maps, Writings, Title Deeds, Paintings, Engravings, Pictures, Gold or Silver Plate or plated Articles, Glass, China, Silks in a manufactured or unmanufactured State, and whether wrought up or not wrought up with other Materials, Furs, or Lace,[1] or any of them, contained in any Parcel or Package which shall have been delivered, either to be carried for Hire or to accompany the Person of any Passenger in any Mail or Stage Coach or other public Conveyance, when the Value of such Article or Articles or Property aforesaid contained in such Parcel or Package shall exceed the Sum of Ten Pounds, unless at the Time of the Delivery thereof at the Office, Warehouse, or Receiving House of such

[1] The Carriers Act Amendment Act, 1865, provides that the term "lace" is to be construed as not including machine-made lace.

Mail Contractor, Stage Coach Proprietor, or other common Carrier, or to his, her, or their Book-keeper, Coachman, or other Servant, for the Purpose of being carried or of accompanying the Person of any Passenger as aforesaid, the Value and Nature of such Article or Articles or Property shall have been declared by the Person or Persons sending or delivering the same, and such increased Charge as herein-after mentioned, or an Engagement to pay the same, be accepted by the Person receiving such Parcel or Package.

II. And be it further enacted, That when any Parcel or Package containing any of the Articles above specified shall be so delivered, and its Value and Contents declared as aforesaid, and such Value shall exceed the Sum of Ten Pounds, it shall be lawful for such Mail Contractors, Stage Coach Proprietors, and other common Carriers to demand and receive an increased Rate of Charge, to be notified by some Notice affixed in legible Character in some public and conspicuous Part of the Office, Warehouse, or other Receiving House where such Parcels or Packages are received by them for the Purpose of Conveyance, stating the increased Rates of Charge required to be paid over and above the ordinary Rate of Carriage as a Compensation for the greater Risk and Care to be taken for the safe Conveyance of such valuable Articles; and all Persons sending or delivering Parcels or Packages containing such valuable Articles as aforesaid at such Office shall be bound by such Notice, without further Proof of the same having come to their Knowledge.

III. Provided always, and be it further enacted, That when the Value shall have been so declared, and the increased Rate of Charge paid, or an Engagement to pay the same shall have been accepted as herein-before mentioned, the Person

receiving such increased Rate of Charge or accepting such Agreement shall, if thereto required, sign a Receipt for the Package or Parcel, acknowledging the same to have been insured, which Receipt shall not be liable to any Stamp Duty; and if such Receipt shall not be given when required, or such Notice as aforesaid shall not have been affixed, the Mail Contractor, Stage Coach Proprietor, or other common Carrier as aforesaid shall not have or be entitled to any Benefit or Advantage under this Act, but shall be liable and responsible as at the Common Law, and be liable to refund the increased Rate of Charge.

IV. Provided always, and be it enacted, That from and after the First Day of *September* now next ensuing no public Notice or Declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the Liability at Common Law of any such Mail Contractors, Stage Coach Proprietors, or other public common Carriers as aforesaid, for or in respect of any Articles or Goods to be carried and conveyed by them; but that all and every such Mail Contractors, Stage Coach Proprietors, and other common Carriers as aforesaid shall from and after the said First Day of *September* be liable, as at the Common Law, to answer for the Loss of any Injury to any Articles and Goods in respect whereof they may not be entitled to the Benefit of this Act, any public Notice or Declaration by them made and given contrary thereto, or in anywise limiting such Liability, notwithstanding.

V. And be it further enacted, That for the Purposes of this Act every Office, Warehouse, or Receiving House which shall be used or appointed by any Mail Contractor or Stage Coach Proprietor or other such common Carrier as aforesaid for the receiving of Parcels to be conveyed as aforesaid,

shall be deemed and taken to be the Receiving House, Warehouse, or Office of such Mail Contractor, Stage Coach Proprietor, or other common Carrier; and that any One or more of such Mail Contractors, Stage Coach Proprietors, or common Carriers shall be liable to be sued by his, her, or their Name or Names only; and that no Action or Suit commenced to recover Damages for Loss or Injury to any Parcel, Package, or Person, shall abate for the Want of joining any Co-proprietor or Co-partner in such Mail, Stage Coach, or other public Conveyance by Land for Hire as aforesaid.

VI. Provided always, and be it further enacted, That nothing in this Act contained shall extend or be construed to annul or in anywise affect any special Contract between such Mail Contractor, Stage Coach Proprietor, or common Carrier, and any other Parties, for the Conveyance of Goods and Merchandizes.

VII. Provided also, and be it further enacted, That where any Parcel or Package shall have been delivered at any such Office, and the Value and Contents declared as aforesaid, and the increased Rate of Charges been paid, and such Parcels or Packages shall have been lost or damaged, the Party entitled to recover Damages in respect of such Loss or Damage shall also be entitled to recover back such increased Charges so paid as aforesaid, in addition to the Value of such Parcel or Package.

VIII. Provided also, and be it further enacted, That nothing in this Act shall be deemed to protect any Mail Contractor, Stage Coach Proprietor, or other common Carrier for Hire from Liability to answer for Loss or Injury to any Goods or Articles whatsoever arising from the felonious Acts of any Coachman, Guard, Book-keeper, Porter, or other Servant in his or their Employ, nor to protect any

such Coachman, Guard, Book-keeper, or other Servant from Liability for any Loss or Injury occasioned by his or their own personal Neglect or Misconduct.

IX. Provided also, and be it further enacted, That such Mail Contractors, Stage Coach Proprietors, or other common Carriers for Hire shall not be concluded as to the Value of any such Parcel or Package by the Value so declared as aforesaid, but that he or they shall in all Cases be entitled to require, from the Party suing in respect of any Loss or Injury, Proof of the actual Value of the Contents by the ordinary legal Evidence, and that the Mail Contractors, Stage Coach Proprietors, or other common Carriers as aforesaid shall be liable to such Damages only as shall be so proved as aforesaid, not exceeding the declared Value, together with the increased Charges as before mentioned.

X. And be it further enacted, That in all Actions to be brought against any such Mail Contractor, Stage Coach Proprietor, or other common Carrier as aforesaid, for the Loss of or Injury to any Goods delivered to be carried, whether the Value of such Goods shall have been declared or not, it shall be lawful for the Defendant or Defendants to pay Money into Court in the same Manner and with the same Effect as Money may be paid into Court in any other Action.

XI. And be it further enacted, That this Act shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such by all Judges, Justices, and others, without being specially pleaded.

INNKEEPERS ACT, 1863.

26 & 27 VICT., C. 41.

1. No Innkeeper shall, after the passing of this Act, be liable to make good to any Guest of such Innkeeper any Loss of or Injury to Goods or Property brought to his Inn, not being a Horse or other live Animal, or any Gear appertaining thereto, or any Carriage, to a greater Amount than the Sum of Thirty Pounds, except in the following Cases; (that is to say,)

(1) Where such Goods or Property shall have been stolen, lost, or injured through the wilful Act, Default, or Neglect of such Innkeeper or any Servant in his Employ:

(2) Where such Goods or Property shall have been deposited expressly for safe Custody with such Innkeeper:

Provided always, that in the Case of such Deposit it shall be lawful for such Innkeeper, if he think fit, to require, as a Condition of his Liability, that such Goods or Property shall be deposited in a Box or other Receptacle, fastened and sealed by the Person depositing the same.

2. If any Innkeeper shall refuse to receive for safe Custody, as before mentioned, any Goods or Property of his Guest, or if any such Guest shall, through any Default of such Innkeeper, be unable to deposit such Goods or Property as aforesaid, such Innkeeper shall not be entitled to the Benefit of this Act in respect of such Goods or Property.

3. Every Innkeeper shall cause at least One Copy of the First Section of this Act, printed in plain Type, to be exhibited in a conspicuous Part of the Hall or Entrance to his Inn, and he shall

be entitled to the Benefit of this Act in respect of such Goods or Property only as shall be brought to his Inn while such Copy shall be so exhibited.

4. The Words and Expressions herein-after contained, which in their ordinary Signification have a more confined or a different Meaning, shall in this Act, except where the Nature of the Provision or the Context of the Act shall exclude such Construction, be interpreted as follows; that is to say, the Word "Inn" shall mean any Hotel, Inn, Tavern, Public-House, or other Place of Refreshment, the Keeper of which is now by Law responsible for the Goods and Property of his Guests; and the Word "Innkeeper" shall mean the Keeper of any such Place.

RAILWAY FIRES ACT, 1905.

5 Edw. VII., c. 11.

1.—(1) When, after this Act comes into operation, damage is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage.

(2) Where any such damage has been caused through the use of an engine by one company on a railway worked by another company, either company shall be liable in such an action; but, if the action is brought against the company working the railway, that company shall be entitled to be indemnified in respect of their liability by the company by whom the engine was used.

(3) This section shall not apply in the case of

any action for damage unless the claim for damage in the action does not exceed one hundred pounds.[1]

2.—(1) A railway company may enter on any land and do all things reasonably necessary for the purpose of extinguishing or arresting the spread of any fire caused by sparks or cinders emitted from any locomotive engine.

(2) A railway company may, for the purpose of preventing or diminishing the risk of fire in a plantation, wood, or orchard through sparks or cinders emitted from any locomotive engine, enter upon any part of the plantation, wood, or orchard, or on any land adjoining thereto, and cut down and clear away any undergrowth, and take any other precautions reasonably necessary for the purpose; but they shall not, without the consent of the owner of the plantation, wood, or orchard, cut down or injure any trees, bushes, or shrubs.

(3) A railway company exercising powers under this section shall pay full compensation to any person injuriously affected by the exercise of those powers, including compensation in respect of loss of amenity, and any compensation so payable shall, in case of difference, be determined in England and Ireland by two justices in manner provided by section twenty-four of the Lands Clauses Consolidation Act, 1845, and in Scotland by the sheriff in manner provided by section twenty-two of the Lands Clauses Consolidation (Scotland) Act, 1845.

3. Repealed.[2]

4. In this Act—

The expression "agricultural land" includes arable and meadow land and ground used for pastoral purposes or for market or nursery gardens, and plantations and woods and orchards, and also includes any fences

[1] Increased to £200 by the Amendment Act, 1923.

[2] See the provisions of sec. 2 of the Amendment Act, 1923.

on such land, but does not include any moorland or buildings;

The expression "agricultural crops" includes any crops on agricultural land, whether growing or severed, which are not led or stacked;

The expression "railway" includes any light railway and any tramway worked by steam power.

This Act shall apply to agricultural land under the management of the Commissioners of Woods, and to agricultural crops thereon.

5. This Act shall come into operation on the first day of January one thousand nine hundred and eight, and may be cited as the Railway Fires Act, 1905.

RAILWAY FIRES ACT (1905) AMENDMENT ACT, 1923.

13 & 14 Geo. V., c. 27.

1. Subsection (3) of section one of the Railway Fires Act, 1905 (hereinafter called the principal Act), shall be amended by the substitution of the words "two hundred pounds" for the words "one hundred pounds" in the said subsection.

2. The principal Act shall not apply in the case of any action for damage by fire brought against any railway company unless (1) notice in writing of the fire having occurred and of intention to claim in respect thereof shall have been sent to the said railway company within seven days of the occurrence of the damage; and (2) particulars in writing of the damage showing the amount of the claim in money not exceeding the said sum of two hundred pounds shall have been sent to the

said railway company within twenty-one days of the occurrence of the damage.

3. Section three of the principal Act is hereby repealed.

4. This Act shall not apply in the case of any fire which has occurred before the passing of this Act.

5. This Act may be cited as the Railway Fires Act (1905) Amendment Act, 1923.

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